89-1499

No. _____

IN THE
Supreme Court of the United States

October Term, 1989

A. F. PLAZZO
and
PLAZZO INSURANCE SERVICES, INC.,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE LIFE INSURANCE COMPANY,
NATIONWIDE GENERAL INSURANCE COMPANY,
and NATIONWIDE PROPERTY & CASUALTY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Is a commissioned insurance agent and participant in a pension plan established by his insurance company, automatically precluded, as a matter of law, from the statutory protection and benefits available to employees under the Employee Retirement Insurance Security Act (ERISA)?

II. In an action brought under 29 U.S.C. §1132(a)1(B), what test should a district court apply to resolve the issue of employee status?

III. When should the review of a district court's finding that a participant in an ERISA deferred income retirement plan is an "employee" for ERISA purposes be de novo and when should such finding be governed by "the clearly erroneous rule"?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for full text publication but was designated as Plazzo v. Nationwide Mut. Ins. Co., No. 88-4016, (6th Cir. 1989) and is printed in Appendix B hereto, p. 81.

The opinion of the United States District Court of the Northern District Eastern Division is reported at Plazzo v. Nationwide Mut. Ins. Co., 697 F.Supp. 1437 (N.D. Ohio 1988) and is printed in Appendix A hereto, p. 24.

JURISDICTION

The opinion of the United States Court of Appeals Sixth Circuit was decided on December 22, 1989, (Appendix B, infra, p. 81.) This Petition for a Writ of Certiorari is filed within ninety days of that date. Petitioners' Petition for Rehearing to the United States Court of

Appeals for the Sixth Circuit with Suggestion for Rehearing En Banc was denied on February 16, 1990. (Appendix C, infra, p. 91.) The jurisdiction of the United States Supreme Court is invoked under Title 28, United States Code 1254(1).

STATUTES INVOLVED

The provisions of the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 and specifically § 1002(2)(B)(6), which provides:

> an "employee" means any individual employed by an employer. (Appendix E, p. 138.)

STATEMENT OF CASE

This case involves the definition of "employee" found in Title I of the Employment Retirement Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461.[1]

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[1] 29 U.S.C. § 1002 (2)(B)(6) The term "employee" means any individual employed by an employer. (Appendix E, page 138.)

Petitioners' claims for relief, filed in February of 1987, were brought under 29 U.S.C. § 1132(a)(1)(B) which, inter alia, permits a civil action to be brought in Federal Court by a participant to recover benefits due him under an employee benefit plan. (Appendix E, page 138)

Petitioners specifically alleged in their Complaint that Plazzo was a participant in a deferred income retirement plan and that he was an "employee" of the Respondents for twenty-two and one-half (22½) years. During that period of time, he had been contractually engaged to sell insurance on a commissioned basis exclusively for the Respondents.

In their Answer, Respondents claimed that the petitioners were "independent contractors," did not qualify for benefits under the Agent's Security Compensation Plan (ASCP), and were not entitled to the benefits and protection of ERISA. Respondents denied

that the district court had jurisdiction to hear and determine the petitioners' claim for benefits under ERISA.

Despite such denial, the district court assumed jurisdiction. The judge conducted a seven-day bench trial, during which he heard testimony from numerous witnesses and reviewed hundreds of exhibits.

After the trial, the court posed the question:

> [D]o the facts, the circumstances surrounding the relationship existing between Plazzo and Nationwide, suggest that he was an employee of Nationwide and thus entitled to the benefits of ERISA? Plazzo v. Nationwide Mut. Ins. Co., 697 F.Supp. 1437 (N.D. Ohio 1988) at page 1446 (Appendix A, p. 57.)

The court concluded that the meanings of the words "independent contractor" and "employee" are those given by the precepts of the common law. Id. at page 1448 (Appendix p. 62). Consequently, he found that:

> Mr. Plazzo's status was more akin to that of an employee than that of an independent contractor. The control exerted over him by Nationwide was much more pervasive and of greater duration than the control exerted over a classic independent contractor. Id. at page 1449 (Appendix p. 69),

and, then, concluded:

> [a]fter weighing and assessing all of the above factors, both common law and Darden[2], this court concludes that A.F. Plazzo was a member of the class of people which Congress sought to protect in enacting ERISA and was an employee of Nationwide for purposes of the Act. Id. at page 1449.

The district court took note of Judge Graham's decision in Wolcott v. Nationwide Mut. Ins. Co., 664 F.Supp. 1533 (S.D. Ohio 1987) (Appendix E, p. 121.) Wolcott had also been a "career agent" with Nationwide for several years. In concluding that there was no genuine issue of material fact, Judge Graham found that Wolcott was an "employee" for ERISA purposes and granted Wolcott's

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[2]Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701 (4th Cir. 1986)

motion for summary judgment. He acknowledged and applied the standard established by this court[3], in his review of the materials submitted by the parties in accordance with Rule 56, Fed.R.Civ.P. and concluded that:

> [w]eighing the totality of the circumstances in the present case, the Court has reached the conclusion that plaintiff is a member of the class of people which Congress sought to protect in enacting ERISA, and that plaintiff is an employee for purposes of ERISA. Id., at page 1537 (Appendix p. 70.)

Upon Nationwide's motion to amend the court's judgment filed under Rule 59 Fed.R.Civ.P., Judge Graham stated:

> The court, upon due consideration of the additional authorities and argument presented by defendants, adheres to its original finding that based upon all the circumstances in the present case, [Wolcott] was an "employee" for purposes of ERISA. Id., at page 1543.

In the Plazzo opinion, Judge Bell recognized and discussed two circuit court decisions (Holt v. Winpisinger, 811 F.2d 1532

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[3]Celotex Corp. v. Catrett, 477 U.S. 317, (1986).

(D.C. Cir. 1987) and Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701 (4th Cir. 1986)) in order to find the applicable test "to determine whether plaintiffs are 'employees' as contemplated by the Act." Plazzo, supra, at page 1444 (Appendix p. 48.)

The district court's Order of October 21, 1988, was accompanied by Findings of Fact and Conclusions of Law produced as a result of the seven-day trial, and written independently of the parties. It read as follows:

> Mr. Plazzo is presently past sixty years of age and is therefore entitled to enforce payment of his pension benefits. IT IS SO ORDERED. Plazzo, supra at page 1451 (Appendix p. 80).

Having previously appealed the Wolcott decision, Respondents appealed to the United States Court of Appeals, Sixth Circuit.

In the summer of 1989, while both appeals were pending, a panel of the Sixth Circuit reviewed the issue of whether a participant

in an ERISA health plan was an "employee" within the terms of ERISA. See Waxman v. Luna, 881 F.2d 237 (6th Cir. 1989) at page 241.

> In resolving the issue of whether a plaintiff is an employee within the terms of ERISA, courts have turned to two sources. The first source involves common law rules of agency in determining whether an individual is an employee or an independent contractor. See Holt v. Winpisinger, 811 F.2d 1532, 1538 n. 44 (D.C. Cir. 1987). This test involves an analysis of all factors relevant to the employment relationship, including the intent of the parties, and the right of one party to control the other party's means and manner of performance. See Holt, 811 F.2d at p. 1538-40; see also RESTATEMENT (SECOND) OF AGENCY §220 (1958).
>
> Other courts have rejected a common-law analysis of "employee" under the terms of ERISA and have, instead, turned to a second source for defining "employee." This source looks to congressional purpose in enacting ERISA and asks whether the purported plaintiff is within the class that Congress sought to protect with ERISA legislation. See Darden v. Nationwide Mutual Ins. Co., 796 F.2d 701, 706 (4th Cir. 1986). In Darden, the court was determining whether the plaintiff had standing to bring an ERISA action for pension benefits. The court stated that the focus of congressional concern in

> enacting ERISA was financial hardship resulting from a forfeiture of accrued benefits during retirement. Darden, 796 F.2d at p. 706; see also 29 U.S.C. § 1001. One of the factors that the Darden court found dispositive was an employee's reliance on an expectation of future benefits as evidenced by remaining in the employer's service for a significant amount of time and foregoing other means of providing retirement.

On August 24, 1989, one year after it had been argued, Wolcott was decided. Following a de novo review of the very same material considered by Judge Graham in Wolcott, the appellate court reversed the finding that Wolcott was an "employee" under ERISA. The court of appeals concluded:

> Given these undisputed facts, we conclude that Wolcott was not Nationwide's 'employee' within the meaning of ERISA. Wolcott v. Nationwide Mut. Ins. Co., 664 F.Supp. 1533 (S.D. Ohio 1987) (Appendix D, p. 120).

On December 22, 1989, a panel of the Sixth Circuit also reversed the decision of the district court in Plazzo. (Appendix B, p. 81). The rationale of the court was

similar to, and based upon, the Wolcott decision.

> Although the district court applied similar common law criteria, in light of Wolcott we cannot agree with its finding that Plazzo was an employee of Nationwide for the purposes of ERISA. . . .
>
> Thus, we conclude that Plazzo, like Wolcott, was an independent contractor, not an employee for the purposes of ERISA. Accordingly, the judgment of the district court is reversed. (Appendix p. 90.)

A petition for an en banc hearing was denied. Petitioners pointed out that the panel had merely disagreed with the finding of the district court; the panel had never claimed that the district court's finding was clearly erroneous.

It was made clear in Wolcott, and by adaptation in Plazzo, that the Sixth Circuit had rejected the reasoning and conclusion reached by the Fourth Circuit in Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701 (4th Cir. 1986).

Because Courts of Appeals have expressed divergent views concerning the definition of "employee" under ERISA, Petitioner submits to this court the following Reasons for Granting Petition.[4]

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[4]During this term, the court granted a Writ to the Tenth Circuit Court of Appeals which had not invoked ERISA's anti-alienation provision to protect petitioner's retirement benefits "[b]ecause Courts of Appeals have expressed divergent views . . ." concerning misconduct that would affect one's entitlement to protection under the Act. Guidry v. Sheet Metal Workers National Pension Fund, et al., ____ U.S. ____58 USLW (1990)

REASONS FOR GRANTING PETITION

I.

Is a commissioned insurance agent and participant in a pension plan established by his insurance company, automatically precluded, as a matter of law, from the statutory protection and benefits available to employees under the Employee Retirement Insurance Security Act (ERISA)?

Reversing a summary judgment of the district court, the Sixth Circuit held as a matter of law that a Nationwide insurance agent is an "independent contractor" and, consequently, is not entitled to the statutory protection available to an "employee" under ERISA. Wolcott v. Nationwide, 884 F.2d 245 (6th Cir. 1989). In judging the factual relationship between this agent and his insurance company, the appellate court strictly applied traditional common law principles without regard for the broad remedial purposes of ERISA.

On the other hand, the Fourth Circuit has found that the common law definition of the word "employee" was not broad enough to do justice to the policies and purposes of the Act. Drawing an analogy from prior decisions of the Supreme Court, it held that the definition of the word "employee" should be tailored to the facts given the broad nature of the statute. Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701 (4th Cir. 1986).

As a consequence, the Ohio appellate decisions of 1989 caused an anomaly between the circuits — a conflict in the result and a conflict as to the means of achieving such result.

In Darden v. Nationwide Mut. Ins. Co., 717 F.Supp. 388, (E.D.N.C. 1989), a Nationwide commissioned agent in Fayetteville, North Carolina, of eighteen years was found to be an "employee" for ERISA purposes.

The decision in Plazzo v. Nationwide Mut. Ins. Co., 697 F.Supp. 1437 (N.D. Ohio 1988) was reversed by the court below. As a result, a Nationwide commissioned agent in Akron, Ohio, for over twenty-two years was found to be an "independent contractor".

II.

In an action brought under 29 U.S.C. §1132(a)1(B), what test should a district court apply to resolve the issue of employee status?

The courts appear to have developed different tests to answer the question of "who is an employee for ERISA purposes?" See Waxman v. Luna, 881 F.2d 237 (6th Cir. 1989) discussed at page 241. The apparent basis for this judicial reaction was the inadequacy of the term "employee" found in 29 U.S.C. § 1002(2)(B)(6) (Appendix. p. 136.) In the past, the courts have determined employment status by considering the following common law factors in connection with the purposes of the statute affecting such employment relationship:

> 1) The degree of control of supervision; (2) the existence and nature of the remuneration for services rendered; (3) the permanency of the relationship; (4) whether the services were rendered in the normal course of business; and (5) conduct on the part of the parties evidencing an employment relationship. Cohen v. Martin's, 537 F.Supp. 766 (1982) Affirmed in 694 F.2d 296 (2nd Cir. 1982).

However, those courts which have considered the relationship in light of the underlying purpose of ERISA, seem unanimous in giving the most weight to the presence of the control factor to distinguish the status of an "employee" from that of an "independent contractor." Id., Holt v. Winpisinger, 811 F.2d 1532, 1538 n. 44 (D.C. Cir. 1987), and Short v. Central States, etc., 729 F.2d 567 (8th Cir. 1984).

In Darden, the Fourth Circuit, when it devised its three-part test, also considered the control that Nationwide exerted over its agents. That court concluded that the

relationship had been affected by the Agent's Security Compensation Plan (ASCP) introduced into the Agent's Standard Agreement in 1972. This agreement, although terminable at will by either party, gave Nationwide overriding control because retirement benefits were conditioned on the agent's promise to remain exclusively with the company and forego the alternative asset value of a marketable independent insurance agency. The agent's reliance upon the expectation of future benefits, as evidenced by his remaining in Nationwide's service for a significant amount of time and foregoing other means of providing retirement, outweighed those factors that expressed the agent's contractual independence. Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701, 706 (4th Cir. 1986), see also 29 U.S.C. §1001.

In rendering his decision that Plazzo's status with Nationwide was more that of an "employee" than that of an "independent

contractor," Judge Bell relied and expanded upon the RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958). He considered and weighed additional evidence presented at trial of the control that Nationwide had exercised over Plazzo. He acknowledged the hybrid relationship of the parties and determined, in light of ERISA, that Plazzo met the test of "employee" for purposes of ERISA. Plazzo, 697 F.Supp., supra, at p. 1449.

The court below reversed the decision of the district court on the authority of Wolcott. The appellate court disagreed with the conclusion reached by the district court. However, the appellate court did note that the trial court and the Wolcott court had used similar common law factors to reach the opposite conclusion. Wolcott, supra, at p. 251.

Significantly, the Per Curiam Opinion of the court did not expressly state that the district court's application of the common

law criteria to the factual relationship between Plazzo and Nationwide was clearly erroneous.

The decision to reverse the district court strongly suggests that the Sixth Circuit has concluded that the question "Is a Nationwide commissioned agent an 'employee' for ERISA purposes?" is one of law rather than one of ultimate fact.

III.

When should the review of a district court's finding that a participant in an ERISA deferred income retirement plan is an "employee" for ERISA purposes be de novo and when should such finding be governed by "the clearly erroneous rule"?

Respondents' argument that the employment status of a Nationwide agent should be one of law seems to have been adopted by the Sixth Circuit. In Wolcott, the appellate court conducted a de novo review of the material presented by

the parties to the district court because it had "erroneously" applied the "totality of circumstances" test in reaching its conclusion rather than the traditional "common law" test. Id. (Appendix E, p. 121.)

The inference derived from the reversal of the district court's summary judgment was that a finding based on "the totality of circumstances test" would be an error of law.

The appellate court's decision to reverse the district court, after a seven-day bench trial, appears to have been based on such an inference. (Appendix B, p. 81.)

Petitioners claim that the court below should be governed by the "clearly erroneous" standard for findings of fact under Fed.R.Civ.P. 52(a). Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1984). The object of this judicial inquiry required an examination of a unique relationship against a statutory background.

Where the courts have been required to consider the question of who is an "employee" and who is an "independent contractor" in industries other than the insurance business, the question has been treated as one of fact. For example, in Wardle v. Central States, et al., 626 F.2d 820 (7th Cir. 1980), a determination of a trust administrator of an ERISA Retirement Plan that Wardle, an owner/operator of a tractor, was an independent contractor was affirmed by the appellate court "although, as the original trier of fact, it might have decided that Wardle was an 'employee' of both companies."

In an Eighth Circuit case, an appellate court found that the owner/operator of a tractor was "an 'employee' for ERISA purposes" and affirmed the trial judge's decision despite the plan administrator, relying solely upon a lawyer's letter, holding otherwise. Short v. Central States, etc., 729 F.2d 567 (8th Cir. 1984).

These decisions confirm the rule that if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse its decision, even though it would have weighed the evidence differently had it been sitting as the trier of fact. Anderson v. City of Bessemer City, North Carolina, supra.

An appellate court ought not to reverse merely because it disagrees with the trier of fact's decision. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, North Carolina, supra. Rule 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous." Pullman-Standard v. Swint, 456 U.S. 273 (1982).

CONCLUSION

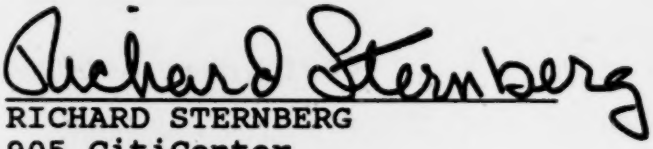
The jurisdiction of this honorable court is properly invoked. This Petition presents a significant federal question of importance requiring plenary consideration, with briefs on the merits and oral argument.

Because the term "employee" used in ERISA is vague, courts have independently developed three tests when deciding employee status for ERISA purposes. This has had three consequences upon judicial decision making. First, the application of different tests has occasionally resulted in disparity among trial court and circuit court decisions. Second, at trial, when credibility is considered, and the evidence is weighed, the outcome is likely to be different from that reached by a court in summary proceedings. Third, there appears to be no definitive answer as to whether the question of employment status under ERISA is one of fact or law.

Clarification by this court is appropriate on all three counts.

The writ of certiorari prayed for by petitioners should issue forthwith.

Dated, this 21st day of March, 1990.



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and NATIONWIDE PROPERTY & CASUALTY COMPANY,

Respondents.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

A. F. PLAZZO, et al.	:	CASE NO. C87-421-A
Plaintiff,	:	JUDGE SAM H. BELL
-v-	:	
NATIONWIDE MUTUAL INSURANCE COMPANY, et al.	:	FINDINGS OF FACT AND CONCLUSIONS OF LAW
Defendant.	:	

Plaintiffs, Anthony F. Plazzo and Plazzo Insurance Services, Inc. filed this lawsuit on February 23, 1988 alleging that defendants, Nationwide Mutual Insurance Co., Nationwide Mutual Fire Insurance Co., Nationwide Life Insurance Co., Nationwide General Insurance Co., and Nationwide Property and Casualty Co. wrongfully denied to them retirement benefits pursuant to the terms of the "Agent's Agreement," which purports to define the relationship of A. F. Plazzo to defendants, and the corporate "Agency Agreement" which defined the

relationship between Plazzo Insurance Services, Inc. and defendants, in violation of the Employee Retirement Income Security Act, (ERISA), 29 U.S.C. § 1001 et seq. A trial to the court was held December 9-17, 1987.

FINDINGS OF FACT

A. F. Plazzo began his employment relationship as an insurance agent with Nationwide in April, 1966 and continued in that capacity under a series of successive Agent's Agreements, the last of which was executed by the defendants and A. F. Plazzo on January 1, 1981. On January 1, 1982, the defendants and Plazzo Insurance Services, Inc. executed a "Corporate Agency Agreement." This agreement is functionally identical to the earlier Agent's Agreements. A. F. Plazzo was the corporation's principal.

Paragraph 11 of the Agent's Agreement provides for "Agent's Security Compensation". Paragraph 11 of the Corporate Agency

Agreement provides for "Agency Security Compensation."

Agent's Security Compensation involves two separate benefit programs. Under the Deferred Compensation Incentive Credit Plan, Nationwide maintained a retirement account for Plazzo and later for the agency and annually credited to that account a sum based on Plazzo's earnings from original and renewal fees for insurance policies. Under the Extended Earnings Plan, Nationwide agreed to pay Plazzo, upon his retirement, termination, death or disability, a sum equal to his earnings from renewal fees over the prior twelve months.

Both agreements at issue also provide that Nationwide's obligation to pay under either Security Compensation Plan would terminate if Plazzo competed with Nationwide within one year of the cancellation of the agent's agreement and within a twenty-five mile radius of the former business location

of the agent. Plazzo's rights to payments were also forfeited if at any time following the cancellation of his agency agreement with Nationwide, he induced a Nationwide policyholder to cancel an insurance contract with Nationwide. The agreements further provided that either party had the right to cancel the agreement at any time following written notice.

Plazzo was required, pursuant to the agency agreements, to represent Nationwide companies exclusively in the sale and service of insurance to the public. He was prohibited from being licensed by any other insurance company.

Plazzo represented the Nationwide companies for over twenty years. The agency agreements provided that he was an "independent contractor" and he was paid strictly on a commission basis. The evidence adduced at trial reveals that career agents such as Mr. Plazzo, were required to attend

regularly scheduled sales meetings and to meet implied quotas or face threatened cancellation of their agency agreements.

In 1983 the then current agency agreement between Plazzo Insurance Services, Inc. (with A. F. Plazzo as the corporation's principal) and Nationwide was unilaterally cancelled by Nationwide. The reasons that prompted this cancellation are relatively unimportant in view of the agreement provision which allowed either party to terminate the agreement at any time for any reason upon written notice to the other party. In any event, the cancellation was not a breach of the agreement.

In 1984 Plazzo received information from Nationwide that any payments owing him under the Agency Security Compensation programs were considered forfeited by Nationwide since Plazzo had allegedly competed with Nationwide

in violation of the Agreement.[5] Plazzo had constructive notice of defendants' failure to pay benefits, when within sixty days following termination of the agency agreement as pursuant to agreement, no payments were made.

CONCLUSIONS OF LAW

The defendants argue that the plaintiffs' action is barred for failure to timely file. Defendants correctly point out that ERISA provides no explicit limitation period for bringing a private cause of action. In such circumstances, the federal

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[5]There is a factual question as to whether Plazzo, either as an individual or as agency principal, competed in violation of the agreement. The weight of the evidence tends to indicate that A. F. Plazzo was in compliance with the terms of the forfeiture clause. The plaintiff made a motion to have the pleadings conform with the evidence, but failed to submit an amended pleading apprising the court of any additional causes of action. Therefore, this court is limited to the ERISA claims raised in the complaint and will not address the issue of whether or not defendants breached the agreement by failing to pay plaintiffs pension benefits due at termination.

courts look to state law for an analogous limitation provision to apply. See Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). The case under review involves benefit plan participants who are seeking those amounts allegedly owed them under the plan. The issue in this case is analogous, therefore, to a breach of contract action. Jenkins v. Local 705 International Brotherhood of Teamsters Pension Plan, 713 F.2d 247 (7th Cir. 1983). The limitation period for contract actions under Ohio law is 15 years. Ohio Revised Code § 2305.06.

However, the defendants argue that the parties defined their own statute of limitations, specifically in paragraph 20 of the Corporate Agency Agreement which provides as follows:

> Legal Action Under This Agreement. It is agreed that no action, suit, proceeding at law or in equity shall be brought under this contract unless it is commenced and process is served within three years after the cause of action for which this suit is brought.

While this provision is not a model of artful drafting, it is not so ambiguous as to render it meaningless, as the plaintiffs argue.

Defendants assert that contract provisions such as the above-quoted provision, modify the law of this State as to limitation periods. Defendants refer the court to Globe American Casualty Co. v. Goodman, 41 Ohio App.2d 231, 325 N.E.2d 257 (Cuy. Cty. 1974), for the proposition that parties may modify the statutory time for bringing an action on an insurance contract provided the shorter period is reasonable. However, the Globe case and others cited to this court by the defendants do not stand for the proposition that parties have the absolute right to vary a statutory period of limitations by contract. Rather, if the parties to a contract for insurance attempt to do so, the courts will examine the totality of the circumstances on a case by case basis to determine the reasonableness

of the modification. Unlike the cases which have been cited to the court, the contract at issue is not an insurance contract nor are the plaintiffs insureds seeking to recover under an insurance policy. Rather, the instant fact situation involves an agreement defining the relationship of an exclusive agent to the insurance company whom he contracts to represent. Additionally, this is not a breach of contract action by an insured but rather an action by participants in a benefit plan to enforce their rights pursuant to a federal statute, i.e., ERISA, 29 U.S.C. § 1001, et seq. Thus, the cases cited by defendants are factually and legally distinguishable from the matter under review.

The court concludes that the fifteen year statute of limitations, found in Ohio Revised Code § 2305.06 is the limitations period applicable to this matter. The court further concludes, however, that this limitations period has not been modified by

the contractual provision found at paragraph 20 of the Agent's Agreement. The complaint raises no state cause of action. Those state courts which have addressed the issue of whether parties may modify a state statute of limitations by a mutually agreed upon contract provision did not reach their conclusions with national interests in mind. It is the duty of the federal courts to assure that the importation of state law will not interfere with or frustrate the implementation of national policies. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367, 97 S.Ct. 2447, 2455, 53 L.Ed.2d 402(1977), quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465, 95 S.Ct. 1716, 1722, 44 L.Ed.2d 295, (1965).

Accordingly, the court holds that O.R.C. § 2305.06 cannot be modified by the parties to a contract to limit the statutory period for the purposes of an ERISA action absent the existence of a state statutory provision

allowing such a contractual modification. Ohio law provides none. An ERISA action is a federal cause of action and while most analogous to a state breach of contract claim, it is distinct from such a cause of action in both its purposes and its source. The court cannot extend the force of Ohio caselaw, which discusses and resolves a state cause of action and distinguishable fact patterns to an ERISA cause of action in federal district court. Therefore the court concludes that counts one and two of the complaint which seek recovery of benefits owed have been timely brought.

Count three of the plaintiffs' complaint alleges a violation of 29 U.S.C. § 1104(a)(1) of ERISA in that defendants, fiduciaries as defined under the Act, failed to discharge their fiduciary duties by failing to act solely in the interest of the participants of the plan by failing to pay those benefits owed under the plan. This claim is governed

by the limitation of actions provisions of 29 U.S.C. § 1113 which provides a three year statute of limitations with respect to a fiduciary's breach of any responsibility, duty or other obligation. Plaintiffs had constructive knowledge of any fiduciary duty on February 1, 1984, the date upon which the contract at issue specified for the payment of benefits, i.e., sixty days following a qualified termination. Plaintiffs did not file suit under 29 U.S.C. § 1104 until February 23, 1987, more than three years from the date they had constructive knowledge of the alleged breach of fiduciary duty. Accordingly, count three of the complaint was not timely brought and is hereby dismissed. Count three will not be addressed in the following findings of fact and conclusion of law.

The defendants also have preserved their affirmative defense of res judicata. For an understanding of this argument, a brief

recitation of the history of this and a related state action is necessary.

The case under review was filed on February 23, 1987 in federal district court. The plaintiffs, A. F. Plazzo and Plazzo Insurance Services, Inc. therein seek the amounts allegedly due them under certain benefit plans alleging that the defendants, Nationwide Mutual Insurance Co., Nationwide Mutual Fire Insurance Co., Nationwide Life Insurance Company, Nationwide General Insurance Co., and Nationwide Property & Casualty Co., ("Nationwide") violated certain provisions of ERISA, 29 U.S.C. § 1001 et seq. when they denied plaintiffs' rights under the benefit plans at issue.

On October 19, 1983, plaintiffs, A. F. Plazzo and Robert Plazzo had earlier filed suit in the Court of Common Pleas, Summit County, Ohio against the same defendants. The state court complaint sounded in breach of contract and the first amended complaint

contained a count alleging that the plaintiffs were entitled to an as yet undetermined amount for retirement and pension benefits. That count was dismissed without prejudice.

Common Pleas Judge Frank J. Bayer ultimately granted summary judgment to Nationwide on all remaining counts of plaintiffs' second amended complaint. The Ninth District Court of Appeals affirmed, and the Ohio Supreme Court refused to review the case.

Defendants argue that the final judgment of the state court bars the present action relying on the doctrine of res judicata. They assert that res judicata obtains where, comparing the two suits, there is an identity of parties and an identity of facts in dispute. The parties in the present suit are undisputedly identical, thus the issue for resolution is whether there is an identity of facts in dispute or in other words, were

the claims or causes of action in the first action the same as in the present one?

To support their arguments of res judicata the defendants rely on the recently overruled case of International Union, United Aerospace and Agricultural Implement Workers of America, UAW v. Cleveland Gear Corp., 644 F.Supp. 241 (N.D. Ohio 1986). In Cleveland Gear, the union originally brought suit in 1983 against the defendant company under the Labor Management Relations Act alleging that Cleveland Gear's reduction of health and life insurance benefits violated the collective bargaining and insurance agreements between the Union and Cleveland Gear. The district court rejected that argument and the Sixth Circuit affirmed, stating that the "decision is without prejudice to any action based on a theory of recovery other than the two contracts at issue."

The Union filed a second action on February 5, 1986 alleging violations of

ERISA, 29 U.S.C. § 1000 et seq., negligent infliction of emotional distress, and detrimental reliance. In response to a motion for summary judgment by Cleveland Gear, the district court ruled that the 1986 action was barred under the doctrine of res judicata, since the 1986 claims and the 1983 claims were ultimately founded upon the collective bargaining and insurance agreements. On appeal to the Sixth Circuit, the district court's order granting summary judgment in favor of Cleveland Gear was overruled. The appeals court noted that count three of the 1986 complaint could be interpreted as raising a claim of promissory estoppel based on promises made by Cleveland Gear and Eaton and that this claim raised issues, questions of fact, and legal determinations not yet addressed by any court. Accordingly, the Circuit Court, finding that the Union's 1986 complaint was based, in part, on a different set of legal

terms and operative facts than the 1983 complaint, concluded that the entire action, including the ERISA claims, were not barred by the doctrine of res judicata. Thus, it is unclear if reliance on Cleveland Gear is determinative of the issues presented here.

The court notes, however, that it is settled law that the judgment of a prior suit, if rendered on the merits, is res judicata between the same parties on the same claim or cause of action and operates as an absolute bar not only to every ground of recovery or defense actually presented in the prior action but also to every ground which might have been presented. Indeed, the doctrine of res judicata precludes a plaintiff from splitting his cause of action so as to make it several actions with respect to claims then capable of recovery in the first action. If an action is brought for a part of a claim, a judgment obtained in the action precludes the plaintiff from bringing

a second action from the residue of the claim. In other words, if the second suit is based on the same cause of action, the judgment upon the merits in the first case is an absolute bar to the subsequent suit, not only in respect to every matter offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. However, the conclusive effect of a judgment on the merits as res judicata is limited to the same cause of action; it does not operate to bar an action on a different cause of action. Cemer v. Marathon Oil Co., 583 F.2d 830 (6th Cir. 1978).

Various tests for defining a cause of action have been advanced by different courts and commentators. A variation of the following test is commonly used to make the determination.

- Whether the factual basis of both claims is the same.

- Whether the essential facts and issues have been similarly presented in both cases.

- Whether the evidence will suffice to sustain both verdicts.

- Whether the same right is infringed by the same wrong.

- Whether the wrong for which redress is sought is the same in both actions.

- Whether the two actions are so similar that a different judgment in the second would destroy or impair rights or interests established by the first.

Addressing the various factors in the order presented above, it is evident that the grounds for recovery in the first action were breach of the Agent's Agreement for terminating plaintiffs unlawfully. Plaintiffs sought damages for the consequences of that breach in state court. The grounds for relief in the second action, i.e. the instant action, are the failure of defendants to abide by the terms of the

Agent's Agreement in relation to post termination benefits. Both grounds are quite similar in that they involve a breach of the Agent's Agreement, but subtly different in that a termination under the terms of the agreement triggered the obligation to pay the benefits provided for in the agreement. In other words, the plaintiffs have alleged two successive and discrete breaches of the same agreement. The first alleged breach was adjudged lawful under the contract, but that conclusion does not preclude the illegality of the second alleged breach. Therefore, the basis of the actions, while indeed similar, are not identical.

Further, the factual basis of each lawsuit, while again quite similar and overlapping, is not the same. Whether the termination of plaintiffs as agents was a breach under the agreement involved only an examination of the agreement, while a determination of whether the plaintiffs have

been unlawfully denied post termination benefits requires an examination of the agreement and an inquiry into the parties post termination conduct, inter alia, the plaintiffs' compliance with the post termination competition requirements included in the Agreement. Thus it is clear that those issues and facts necessary to resolve the question of whether or not plaintiffs were wrongfully denied post termination benefits were not presented to the state court in the first action. The determination that there had been a breach of the agreement when defendants terminated the Agent's Agreement depended upon a review of the agreement, no post termination facts or issues were addressed. Therefore, the evidence to sustain a second verdict was not before the common pleas court when it ruled on the lawfulness of the termination.

Additionally, the right to uninterrupted employment or agency is not identical to the

right to receive benefits upon termination of an employment or agency agreement. Indeed, the alleged wrong addressed in the state action was the defendants' termination of the Agent's Agreement while the wrong alleged in the instant action is the defendants failure to pay termination benefits upon that termination. Finally, the two actions are not so similar that a different judgment in this action would destroy or impair rights or interests established by the first. The state court's conclusion that the defendants had the right under the agent's agreement to terminate their agency relationship with plaintiffs will not be affected by a resolution of whether or not plaintiffs are entitled to the post termination benefits provided for in the agreement. Accordingly, the court concludes that the Summit County action does not bar the bringing of the present suit.

Additionally, defendants allege that ERISA limits the definition of an employee to an "individual." 29 U.S.C. § 1002(6). They further argue that a corporation is not an "individual" for purposes of ERISA. They thus conclude that since it was a corporation, Plazzo Insurance Services, Inc., which contracted to provide services to Nationwide, and not Anthony Plazzo, an individual, that there was no "employee" who can state a cause of action under ERISA. Defendants cite no authority for this contention.

The court has reviewed the statutory definitions at issue and concludes that defendants restrictive interpretation of the statute does not comport with the spirit or the language of ERISA. Thus, while § 1002(6) defines an "employee" as any "individual" employed by an employer, § 1002(9) defines the term "person" as any individual, partnership, joint venture, corporation, mutual company,

joint stock company, trust, estate, unincorporated organization, association, or employee organization. Thus the words "individual" and "corporation" are found in the statute as alternative definitions of the term "person". Accordingly, the court concludes that the fact that A. F. Plazzo attempted to incorporate his insurance agency and as such contracted to represent Nationwide for the final year of their association does not preclude the bringing of suit under the provisions of ERISA. It is undisputed that A. F. Plazzo was considered the agency's "principal" and as such it was his earnings upon which the benefits at issue were calculated.

The next issue the court must address is whether A. F. Plazzo and his agency were "employees" of Nationwide within the meaning of 29 U.S.C. § 1002(6) with respect to the Agency Security Compensation plan. It is undisputed that plaintiffs are denominated

"independent contractors" in the agency agreements. This denomination, while significant, is not controlling. Plaintiffs introduced evidence which indicates that many such "independent contractors", including A. F. Plazzo, consider themselves "captive agents" with little control over the most important aspects of the agency relationship. This evidence, too, while probative, is not controlling.

Defendants argue that the court should adopt the test set forth in Holt v. Winisinger(sic), 811 F.2d 1532 (D.C. Cir. 1987), to determine whether plaintiffs are "employees" as contemplated by the Act. That test is essentially the classic common law test which was developed to define the distinctions between an independent contractor and an employee in order to determine whether vicarious liability would obtain in an employment relationship.

While the Holt opinion is of instructional interest, it cannot be seen as affording the only tool to be utilized in crafting an opinion on this subject. It is thus appropriate to consider and discuss other views rendered in the same or similar contexts which assist in casting light on the question raised.

It is well to begin by defining the scope of the subject. What acts or conditions denominate an "employee" as distinguished from an "independent contractor?" The precedential definition of the word employee is richly imbedded in the common law. The term employee as it is used and defined in the ERISA statute itself means "any individual employed by an employer." (29 U.S.C. § 1002(2)(D)(6)). While the legislative branch gives us small assistance by way of further definition, the Department of Labor has interpreted the word in question broadly, it is claimed, by reason of the

expressed intent of the Congress in enacting ERISA. It was the enunciated concern of Congress that "many employees with long years of employment [were] losing anticipated retirement benefits owing to the lack of vesting provision in such plans." 29 U.S.C. § 1001(a).

The legislative history of ERISA expressly provides that Congress intended that the Act be applied broadly:

> Generally, it would appear that the wider and more comprehensive the coverage, vesting, and finding, the more desireable it is from the standpoint of national policy. One of the major objections of the new legislation is to extend coverage under retirement plans more widely. H.R. Rep. #93-807, 93 Cong., 2d Session (1974).

Feeling justified in so doing, the Department of Labor proceeded to interpret the word "employee" as used in the context of ERISA broadly.

> It is our interpretation that insurance agents whose business activity is predominately with one life insurance company are

> "employees" of that life insurance company within the definition set forth in §3(6). . . Where there exists a potential for abuse under an employee benefit plan, the Department intends to interpret the provisions of ERISA liberally in favor of plan participants and their beneficiaries, in order to protect their rights and benefits under the plan. For this reason, the definition of "employee" as set forth in § 3(6) of ERISA is interpreted broadly to include certain insurance agents who under common-law rules would not be deemed to be "employees". Congress has expressed its intent for broad interpretation of the coverage of ERISA to protect the interests of participants and their beneficiaries. Evidence of this intent is reflected by section 4(a) of ERISA which extends the jurisdiction of Title I provisions to participants of all employee benefit plans except those handfuls mentioned in section 4(b) (and those plans exempted from certain parts of Title I pursuant to sections 201, 301, and 401 of ERISA).

Department of Labor Opinion Letter 77-75 (September 21, 1977).

Were it the task of the Department to affix a legal definition of various terms in the law, our consideration of the present question would need proceed no further. But while an executive agency is empowered to

interpret those statutes it has a duty to enforce, this court is not bound by that interpretation. Rather, it is the judiciary which has the ultimate duty to interpret and enunciate the law after giving deference to administrative interpretations. However, here there is no reason to afford special deference to the Department in the area under discussion:

> We also note the admonition of Justice Reed that the determination of independent contractor status from litigated facts is not a "specialized field of knowledge" to the extent that the Labor Board "carries the authority of an expertness which courts do not possess and therefore must respect. . . .

Radio Officers v. Labor Board, 347 U.S. 17, 50, 98 L.Ed. 455, 482 (1954), 74 S.Ct. 323 as quoted in, Local 777, Democratic U. Organizing Com. v. NLRB, 603 F.2d 862, 907 (1978). It is, therefore, this court's duty to establish the definition of the term "employee."

The breadth of Agency's definition has had its impact on a number of recent decisions which have been cited by the parties. In Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701 (4th Cir. 1986), the Fourth Circuit found that the common law definition of the word employee is not broad enough to do justice to the "policy and purposes" of the Act. Thus, the court stated, in keeping with the Supreme Court decisions in United States. v. Silk, 331 U.S. 704, 91 L.Ed. 1757, 67 S.Ct. 1463 (1954) and NLRB v. Hearst, 322 U.S. 111, 88 L.Ed. 1170, 64 S.Ct. 851 (1944), that the definition of the word employee should be "tailored" to the facts, given the broad nature of the statute. A primary consideration was posed: does the inclusion of a disputed category of persons effectuate the "declared policy" of the statute? In keeping with this view the Darden court indicated two general tests to be applied to the facts so as to arrive at the definition required.

The Darden opinion appears to have had considerable impact on Judge Graham's thoughtful views set forth in Wolcott v. Nationwide, 664 F.Supp. 1533 (S.D. Oh. 1987). In Wolcott while no clear declaration was made concerning whether the common law definition or one of more breadth would be applied, at least lip service was given to the former as set forth in Restatement of Agency while further discussion centered around the Darden elements.

A fundamental dichotomy emerges at this point. All who have considered this question agree that employees - as opposed to independent contractors - are covered parties under ERISA. But some believe that the class - employees - is one definable strictly by common law definition, while others rule that the common law definition is inadequate because it may, if applied, preclude admission of broad groups of people who, though they do not meet the classic

definition of employee, deserve inclusion because their circumstances warrant and because Congress intended a broad and nonrestrictive definition of the word employee. Darden and its progeny suggest that the stated intent of the Congress and the Department of Labor is to include all persons whose inclusion would serve to effectuate the "declared policy and purposes" of ERISA. This being so, the common law definition of the term employee alone is too narrow. A rationale for this view is found in Hearst wherein the Supreme Court opined that the word employee was to be interpreted "in the light of the mischief to be corrected and the end to be attained."

It is clear that the Darden court sought a result which squared a legal definition of the word employee with some broader meaning in the court's attempt to define the term consistent with what it believed was the intent of Congress when it enacted the

statute. As indicated previously, the statutory definition of the word is a sparse one and gives no hint whatever that some more expansive and global meaning is intended.

Clearly, it is the purpose of the act to provide broad coverage for those entitled to that protection. The Darden opinion suggests, at 706:

> In interpreting statutory language so as to define a class of persons protected by the statute, a court must take as its 'primary consideration' whether the inclusion of a disputed category of persons would effectuate the 'declared policy and purposes' of the statute. Silk, 331 U.S. at 713, . . . Hearst, 322 U.S. at 131-33.

As thereafter indicated, Darden, supra, correctly notes that the purposes of ERISA are exactingly set out in § 2 of 29 U.S.C. § 1001. Congress was concerned that "many employees with long years of employment are losing anticipated retirement benefits."

But what class is to be protected? The statute speaks clearly that employees are to

be protected. That word and the class are clear and ask for no result oriented definition to strain their meanings to include a more expansive definition.

It is not the court's task to change, amend, or broaden the meaning of the term to include any given member; but, rather, the court must look to legal precedents to define that word and assess the facts to determine the plaintiffs' claim to membership in a protected class. Here, the question is: do the facts, the circumstances surrounding the relationship existing between Plazzo and Nationwide, suggest that he was an employee of Nationwide and thus entitled to the benefits of ERISA?

Both the Darden opinion and by inclusion the Wolcott opinion give emphasis to the decisions of the Supreme Court in both U.S. v. Silk, supra and NLRB v. Hearst, supra. The court first held that the word "employee" as used in the context of Social Security

legislation could not be defined by the standard of the common law. The court held in similar fashion, when defining the word in the context of the National labor Relations Act. In other words, the court held that the intent of Congress, in enacting the two portions of legislation referred to intended that the word "employee" be given a broader meaning than it was afforded traditionally in view of the Congress' intent to include within ERISA's protections all those who could fit into the perimeter of the protected class.

But if we, as did the Darden, supra, court, give great emphasis to the Hearst, supra, and Silk, supra, view concerning the obviousness of Congressional intent, we must then go one step further. For subsequent history teaches that the intent of Congress as determined by the court was not the intent of Congress at all. Subsequent to the 1974 Silk decision, Congress passed a joint

resolution (62 Stat. 438 (1948)), referred to as the "Status Quo Resolution" or "Gearhart Resolution", the purpose of which was to disapprove the administrative agency's proposed regulations based upon the Silk decision and reiterated Congress' intention that the employee status should be determined by the traditional legal tests. The Hearst decision was assailed as well. Two quotations are of interest here, both from Local 777, Democratic U. Organing Com. v. NLRB, 603 F.2d 862 (1978), at 908:

> Senator Taft, one of the principal contributors and advocates of the legislation, in remarks summarizing the principal differences between the Conference Agreement on H.R. 3020 and the Bill which the Senate passed, stated:
>
> > The legal effect of the amendment [exempting "independent contractors"] therefore is merely to make it clear that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of law of agency.

93 Cong.Rec. 6441-6442 (emphasis added).

In NLRB v. United Insurance Co., 390 U.S. 254, 88 S.Ct. 988, 19 L.Ed.2d 1083 (1968), Justice Black outlined very clearly what it was that the Court had earlier attempted in Hearst, and Congress's response to that effort:

> Initially this Court held in NLRB v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170, that "Whether . . . the term 'employee' includes [particular] workers . . . must be answered primarily from the history, terms and purposes of the legislation." 322 U.S., at 124, 64 S.Ct. 851. Thus the standard was one of economic and policy considerations within the labor field. Congressional reaction to this construction of the Act was adverse and Congress passed an amendment specifically excluding "any individual having the status of an independent contractor" from the definition of "employee" contained in § 2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act. And both petitioners and respondents agree that the proper standard here is the law of agency. Thus there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor.

390 U.S. at 256, 88 S.Ct. at 989-999 (emphasis added) (footnote omitted).

One final note should be added. In Allied Chemical & Alkali Workers v. PPG Co., 404 U.S. 157, 30 L.Ed.2d 341, 92 S.Ct. 383 (1971), the question addressed was whether retired employees were considered employees under collective bargaining agreements relating to health care benefits. Justice Brennan observed concerning the findings of the Board below:

> We recognize that "classification of bargaining subject as 'terms and conditions of employment' is a matter concerning which the Board has special expertise" (citation omitted). The Boards holding in this cause however depends on the application of law to facts and the legal standard to be applied is ultimately for the courts to decide and enforce. . ."

(Emphasis added.) Id. at 182.

In sum, it would seem clear that although Silk, supra, and surely Hearst, supra, held to the contrary, the intent of

the Congress in each instance was to give common law meaning to the word employee. It is further true that in those instances, no artificial meaning gleaned from economic "reality" or social motivation displaced the long standing common law definition of the term in question.

The court is of the opinion first, that no need or justification is shown here to suggest that any meaning other than a common law definition was intended by Congress. Second, to the degree that Darden, supra, and thereafter Wolcott, supra, find Hearst, supra, and Silk, supra, as predicates for their validity, such reliance is misplaced.

In sum, this court is of the opinion - and so rules - that the meaning of the words "independent contractor" and "employee" are those given by the precepts of the common law. The common law factors include:

1. The nature and degree of control retained by the employer.

2. The degree of supervision retained by the employer over the details of the work.

3. The extent to which services are an integral part of the employer's business or a distinct business.

4. The duration of the relationship.

5. Who supplies the place or instrumentalities of work.

6. The method of payment.

7. The employee's opportunity for loss or profit.

8. The amount of initiative, skill, judgment or foresight required of the employee for the success of the enterprise.

9. The right to discharge.

10. Whether the employee is engaged in a business apart from the business of the employer.

11. Whether an employee can hire and control its own employees.

12. Whether the employer withholds taxes or pays social security for the employee.

See Restatement (Second) of Agency § 220 (1958).

The first common law factor cannot be weighed overwhelmingly on the side of independent contractor or employee status, however, the court concludes that the evidence adduced at trial favors the conclusion that Plazzo was an employee for the purposes of this factor. That evidence revealed that although a career agent such as A. F. Plazzo had a great deal of freedom to arrange his business affairs, that freedom was severely circumscribed in several particulars. Mr. Plazzo was required to represent only Nationwide and no other insurance company (without the express permission of Nationwide). He labored under what witnesses described as an "implied quota." In fact, Robert Plazzo, the plaintiff's son, testified that while he served Nationwide as a district manager, he was required to warn agents whose sales were

lagging of possible termination if their sales did not increase and to suggest resignation to such offenders. Additionally, witnesses, who either were or are currently Nationwide agents, testified that their attendance at sales meetings was mandatory in practice. There was further testimony that agents were often restricted as to how much of a certain variety of insurance they could sell. Finally, and perhaps most importantly, agents had no control over the terms of their agency agreements. There was no negotiation of terms, agents were required to accept the terms wholesale in order to commence or continue their association with Nationwide. On the other hand, Mr. Plazzo was free to chose(sic) his own hours, his own office, and his own employees.

The second factor seems to militate towards independent contractor status. This determination, however, depends upon the definition afforded "details". It appears

that Mr. Plazzo was free to define his own business relationships with his employees and his clients. He could chose(sic) whom to hire and whom to contact. The details of who, what, when and where of conducting his sales business were completely within Mr. Plazzo's control. But, if "details" is defined as the minutia involved in insurance contracts, these details were the sole prerogative of Nationwide.

The third factor suggests an employee relationship. Service is clearly an integral part of both Nationwide and Mr. Plazzo's business; both were in business to sell insurance and to service those accounts. The business of Nationwide and the business of Mr. Plazzo were not distinct from one another.

The fourth factor again suggests an employee relationship. Mr. Plazzo represented Nationwide exclusively for over twenty years.

The fifth factor indicates an independent contractor status. Clearly the place of business was supplied by A. F. Plazzo who built his own building, to his own (or his son's) specifications to house his Nationwide insurance agency. The furnishings, office equipment, etc. were also supplied by A. F. Plazzo. However, the computer which linked Nationwide with the Plazzo Agency was the property of Nationwide.

Mr. Plazzo was paid solely on commission although there was undisputed testimony that "orphan" policies, i.e., policies without an agent, which were income producing were distributed as they became "orphaned" according to a(sic) incomprehensible or perhaps ad hoc company policy. There was testimony that some found homes as the result of contests, some went to new and struggling agents, while others were randomly distributed. Because of this, while career agents were generally paid on a commission

basis, they could become the beneficiary of income if they were awarded orphan policies. Thus, some part of an agent's income could come from sources other than their own initiative and resourcefulness. But on the whole, an agent's initiative, skill, and judgment were the mainstays of his (her) income.

Either party to the agency agreement could terminate it at any time. This factor is equivocal. It is not unlike a terminable-at-will employment relationship. And, as is often the case in an employment relationship, the hardships of termination are suffered more acutely by the discharged agent than the company. While Nationwide perhaps loses a talented agent, the agent cannot take the policies with him (her), these are the property of Nationwide. If the agent's termination is "unqualified" he not only loses his livelihood but his retirement benefits as well.

Nationwide and A. F. Plazzo were engaged in the same business. Nationwide is in the business of selling and servicing insurance policies, so was Mr. Plazzo. Mr. Plazzo was able to hire and control his own employees, which usually involved office help. Mr. Plazzo withheld taxes and paid social security for his employees.

Thus, the relationship between Nationwide and Plazzo was certainly not a classic independent contractor relationship, nor was it a classic employer/employee relationship. However, a review of the common law factors indicates that Mr. Plazzo's status was more akin to that of an employee than that of an independent contractor. The control exerted over him by Nationwide was much more pervasive and of greater duration than that control exerted over a classic independent contractor.

After weighing and assessing all of the above factors, both common law and Darden,

this court concludes that A. F. Plazzo was a member of the class of people which Congress sought to protect in enacting ERISA and was an employee of Nationwide for purposes of the Act.

Next, the court must resolve the issue of whether the Agent's Security Compensation Plan is an employee pension plan under ERISA. An employee pension benefit plan is defined in 29 U.S.C. § 1002(2)(A), as ". . . any plan, fund, or program which was heretofore or is hereafter established by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program - (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond."

The Agent's Security Compensation Plan includes two benefit programs, deferred

compensation incentive credits and extended earnings. The Agency Agreements provide that both programs are forfeited by the agent if he (or the agency's principal)

> . . . induced or attempted to induce, either directly or indirectly, policyholders to lapse, cancel, or replace any insurance contract in force with Nationwide.
>
> . . .
>
> either directly or indirectly, by and for himself or as an agent, solicitor, representative or broker in any way be connected with the fire, casualty, health, or life insurance business within one year following cancellation within a twenty-five (25) mile radius of Agency's business location at the time of cancellation. . .

Exhibit B at 5.

The deferred compensation plan is financed through contributions made by Nationwide on the agent's behalf to a group annuity. The amount of contribution for an agent is calculated based upon a percentage of the sales and renewal fees earned by the agent. Contributions to an agent's account

begin when the agent has completed five years of service and continue until he/she is terminated for any reason including, but not limited to, retirement, death, or disability as long as he/she has reached age sixty. A plan participant may elect to receive early reduced deferred compensation benefits at any time upon or after reaching the age of fifty and is entitled to one hundred percent of the accrued benefits if payments begin at age sixty. Benefits are paid over a period of three to ten years or as a life annuity.

In view of the benefit accrual and distribution features of the Deferred Compensation Plan, the court concludes that it provides retirement income to employees and is an employee pension benefit plan under ERISA.

The Extended Earnings Plan establishes a benefit whereby an agent with at least five years service who is terminated upon retirement, death or disability, or qualified

cancellation for other reason, is entitled to a sum equal to the renewal services fees paid to the agent by Nationwide for the last twelve calendar months immediately preceding the cancellation of the agreement. The benefit is payable beginning sixty days following the termination of the agency agreement, and the payments are made over a period of three to ten years or as a life annuity depending upon the method of payment elected by the agent. The benefit is financed by decreasing for a two year period the renewal commission rates of the agent who takes over the files of the departing agents. Payments are not dependent upon the agent attaining an age certain, but are distributed only upon termination of service. The Extended Earnings Plan is not an immediate termination bonus but results in deferring a portion of the agent's income for distribution over an extended period beyond his termination. This plan, too, includes

the indicia of a pension benefit plan under ERISA, 19 U.S.C. § 1002(2).

The defendants rely on the Fourth Circuit opinion in Fraver v. North Carolina Farm Bureau Mutual Insurance Company, 801 F.2d 675 (4th Cir. 1986), cert. denied, ___ U.S. ___, 94 L.Ed. 2d 690, 107 S.Ct. 1375 (1987), for the proposition that the Extended Earnings Plan represents a "buy out" provision in the agent's agreement whereby the post-termination benefits are calculated on the basis of an agent's commissions for the prior year and, in that respect, are like a final commission, paid over an extended period. The Fraver court concluded that such benefits are in the nature of a buy out in which the departing agent receives payments based upon what he leaves behind in the way of business for his successor. The court further reasoned that if the departing agent goes into competition with his successor, he is destroying the resource that would be used to pay him.

However, the evidence introduced at trial revealed that a Nationwide agent had no exclusive right to customer accounts which he could sell, hence no exclusive rights to clients which could be bought out. Any accounts or policy holders which A. F. Plazzo serviced were accounts or policy holders of Nationwide. These were Nationwide accounts and following termination a former Nationwide agent has no proprietary interests in those accounts. They become "orphan policies" and are distributed to the agents of Nationwide's choice. The departing agent has no control over the distribution of his former accounts.

Accordingly, the court concludes that the Extended Earnings plan is not in the nature of a "buy out," but is a pension benefit plan. The legislative history of ERISA supports this conclusion:

> [I]n order to protect plan participants and beneficiaries against an erosion of ERISA's standards, supplemental retirement income payments or a severance

> pay arrangement, a principal effect of which is the evasion of the standards or purpose of title I of ERISA is treated under the bill as a pension plan rather than a welfare plan. Thus, it [a severance pay arrangement] is subject to the ERISA standards.

See Senate Committee Reports, P.L. 96-364, cited in CCH Pension Plan Guide, pg. 14, 130 at 18, 109-5, 18, 110.

Finally, the defendants argue that even if the Agent's Security Compensation plans are found to be pension plans under ERISA the non-forfeiture provision of § 1053(a) does not apply to the plan by virtue of 29 U.S.C. § 1051(2), which provides that the vesting requirements do not apply to a plan which is unfunded and is maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. Evidence was heard as to whether the plan is funded or unfunded. Nationwide has made various statements as to the funding status

of the plans. This, however, is not conclusive in view of the court's finding that the agents are not a select group of highly compensated individuals within the meaning of § 1051(2). See Wolcott, supra at 1539. There is no clear standard for determining an exempt class of "highly compensated employees" for purposes of this exemption. However, in the context of qualification of benefit plans under the federal tax law, Congress has defined "highly compensated employee" to encompass a small group of officers, upper level management and generally employees earning compensation in the top 20% of all employees. See 26 U.S.C. § 414(q)(1)-(5).

The evidence revealed that there are approximately 5,000 to 6,000 Nationwide agents. These agents are not considered upper management and they do not represent a small number of officers. The evidence further revealed that while some of these

agents may be "highly compensated" there was evidence to suggest that others were not. The evidence revealed that some agents struggle to make "implied quotas" and may be requested to resign. The evidence further showed that the compensation earned by agents was dependent upon their own initiative, judgment and skill and sometimes the receipt of orphan policies. Therefore, it stands to reason that highly motivated agents, such as A. F. Plazzo, were often well compensated while less motivated agents were less well compensated. These are not indicia of a consistently highly compensated select group of individuals. Accordingly, the court finds that the Agent's Security Compensation Plans are subject to the nonforfeiture provisions of § 1053 (a), which provides that "each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon attainment of normal retirement age. . .".

The term "normal retirement age" means the earlier of (1) the time designated in the plan as the normal retirement age, or (2) the later of age sixty-five or the tenth anniversary of the participant's participation in the plan. 29 U.S.C. § 1002(24). The term "normal retirement benefit" means the greater of the early retirement benefit under the plan or the benefit under the plan commencing at normal retirement age. While no age is expressly designated in the plan as "normal retirement age" the plan does provide that an agent at age sixty receives 100% of the accrued benefit. Thus, the court concludes that age sixty is the "normal retirement age" designated in the plan. In other words, since the Nationwide plan specifically provides for payment of 100% of the accrued benefit at age sixty payable upon termination, age sixty is the "normal retirement age". Mr. Plazzo is presently

past sixty years of age and is therefore entitled to enforce payment of his pension benefits.

IT IS SO ORDERED.

SAM H. BELL
U. S. DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

United States District Court	DISTRICT NORTHERN DISTRICT OF OHIO
CASE TITLE A. F. PLAZZO, et al -v- NATIONWIDE MUTUAL INSURANCE COMPANY, et al	DOCKET NUMBER EASTERN DIVISION
	NAME OF JUDGE SAM H. BELL

☐ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment is hereby entered in favor of plaintiffs and against defendants and that plaintiffs shall collect from defendants 100% of the accrued benefit under the Agreements which formed the basis of this action, plus costs.

IT IS FURTHER ORDERED that the court's findings of fact and conclusions of law filed on 21 October 1988 is hereby adopted in accordance with Fed. R. Civ. P.52.

FILED
1988 OCT 21 PM 3:48
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

SIGNATURE		DATE
SAM H. BELL, USDC JUDGE		21 Oct.1988

80 (duplicated)

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

A. F. PLAZZO
and
PLAZZO INSURANCE SERVICES, INC.,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE LIFE INSURANCE COMPANY,
NATIONWIDE GENERAL INSURANCE COMPANY,
and NATIONWIDE PROPERTY & CASUALTY COMPANY,

Respondents.

APPENDIX B

No. 88-4016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

A.F. Plazzo; Plazzo Insurance Services, Inc., Plaintiffs-Appellees,	)	**F I L E D** **DEC 22 1989**
v.	)	**LEONARD GREEN, Clerk**
Nationwide Mutual Insurance Company, Defendant-Appellant, Nationwide Mutual Fire Insurance Company, et al. Defendants	)	On Appeal from the United States District Court for the Northern District of Ohio

Decided and Filed _____

Before: KEITH and BOGGS, Circuit Judges; and PECK, Senior Circuit Judge

PER CURIAM. Defendant-appellant Nationwide Mutual Insurance Company appeals from the judgment of the district court holding that plaintiff-appellee, A.F. Plazzo, was an employee of Nationwide for the purposes of the Employee Retirement Income Security Act

of 1974, 29 U.S.C. § 1001, et seq. (ERISA). In keeping with this court's recent decision in Wolcott v. Nationwide Mutual Insurance Co., 884 F.2d 245 (6th Cir. 1989), which held that a commissioned insurance agent was an independent contractor, not an employee for ERISA purposes, we reverse the judgment of the district court.

FACTS

Between 1961 and 1983, A.F. Plazzo was an unsalaried insurance agent for Nationwide. Plazzo's relationship with Nationwide was governed by a series of agency agreements. Under the agreements, Plazzo was required to represent Nationwide exclusively. These agreements specifically stated that Plazzo was an independent contractor. As such, he was responsible for maintaining his own business, including providing his own office space and hiring his own employees. Nationwide paid Plazzo commission which was reported on IRS Form 1099 Self-Employment

Statement. Plazzo prospered as a Nationwide agent. In 1980, he built his own office building and took his son into his business. In 1982, Plazzo formed a corporation, Plazzo Insurance Services, Inc. (PISI). As the principal for PISI, he arranged with Nationwide to terminate his agent's agreement in favor of a corporate agency agreement for PISI. In October 1983, Plazzo sued Nationwide in state court for the alleged breach of an oral contract to assign certain insurance policies to the Plazzo agency. Summary judgment was granted to nationwide on this claim. In part due to this suit, Nationwide cancelled the agency agreement with PISI in December 1983.

Nationwide alleges that following cancellation of the agreement, the younger Plazzo, with his father's assistance, continued to sell insurance for other insurance companies from the same office they used while selling Nationwide insurance. In

January 1984, PISI sent letters to many Nationwide policyholders previously serviced by the Plazzos, notifying them that PISI was an independent insurance agency and expressing a desire to retain their business. The Plazzos were very successful in switching Nationwide policyholders to their new lines of insurance.

The present dispute involves Plazzo's claim that Nationwide has withheld retirement benefits due him in violation of ERISA. Under the agency agreement, the Agent's Security Compensation Plan (ASCP) conditionally provided payments to agents following the cancellation of the agreement. The ASCP consisted of two parts, Extended Earnings and Deferred Compensation Incentive Credits (DCIC). Extended Earnings provided the agent with an amount equal to renewal commissions earned in the last twelve months of service upon his retirement, termination, disability, or death. Under DCIC, after the

fifth year of service, the agent received credit annually for a percentage of earnings on renewals and new policies on certain types of insurance. To receive the ASCP payments, however, the agent could no directly or indirectly engage in the insurance business within a 25-mile radius of his Nationwide location during the first year following cancellation of the agreement or directly or indirectly induce Nationwide policyholders to cancel or replace their coverage. Due to the Plazzos' sale of other insurance lines and their efforts to induce Nationwide policyholders to change their policies to these new lines, Nationwide determined that Plazzo had failed to meet the conditions for ASCP payments. Plazzo filed suit under § 502(a) of ERISA which provides, inter alia, that a participant in an employee retirement plan may bring a civil action to enforce his rights under the plan or recover benefits under the plan. 29 USC § 1132(a)(1)(B).

Plazzo argued that under the vesting provisions of ERISA, Nationwide cannot enforce the conditions for ASCP payments against him. The district court ruled in Plazzo's favor, and Nationwide appealed.

ANALYSIS

ERISA's vesting provisions, 29 USC § 1053, are only applicable if: 1) Plazzo was an "employee" within the meaning of ERISA; 2) the ASCP is a "pension benefit plan" within the meaning of ERISA; and 3) the ASCP is not a "top hat plan" exempted from ERISA's vesting requirements. Wolcott v. Nationwide Mutual Insurance, 884 F.2d 245, 250 (6th Cir. 1989); see 29 U.S.C. §§ 1132(a), 1002(2)(A), 1002(6), 1002(7), 1051(2). Unfortunately, ERISA's definition of "employee" is not enlightening. "Employee" is defined only as "any individual employed by an employer." 29 USC 1002(6). In Wolcott, supra, this court ruled that the common law rules of agency should be used in determining whether

an individual is an employee for ERISA purposes. The criteria to be considered include:

> 1) the degree of control and supervision over the manner in which the work is performed; 2) whether or not the "employee" is engaged in his own business; 3) the company's right to hire and discharge the persons doing the work; 4) the method of compensation to the "employee"; 5) whether the "employee receives the same benefits as the company's regular employees; 6) who has control of the premises where the work is done; 7) how the parties structure their Social Security and income relations; 8) whether the "employee" stands to make a profit on the work of those working for him; 9) the amount of the "employee's" investment in facilities and equipment; 10) the belief of the parties as to their business relationship; 11) the amount of skill required in the particular occupation; and 12) the duration of time for which the "employee" is employed. (Citations omitted).

Wolcott, 884 F.2d at 251. See Restatement (Second) of Agency § 220(2) (1958). Although the district court applied similar common law criteria, in light of Wolcott we cannot agree

with its finding that Plazzo was an employee of Nationwide for the purposes of ERISA.

The facts of Wolcott are very similar to this case. Wolcott was a commissioned agent with Nationwide for twenty years. A dispute arose because Wolcott's wife and daughter sold competing lines of insurance from Wolcott's office. Nationwide cancelled Wolcott's agency agreement. After cancellation, Wolcott joined his wife and daughter in selling the other lines of insurance from the same office he used to sell Nationwide insurance. Due to these events, Nationwide refused to distribute Wolcott's ASCP payments because he had violated the noncompetition clause of the agency agreement. Wolcott sued alleging a violation of ERISA. The district court granted summary judgment for Wolcott. This court reversed, holding that Wolcott was an independent contractor rather than an employee of Nationwide, and therefore was

not entitled to ERISA's vesting protections. In making its determination, this court noted that Wolcott owned his own office condominium, exercised managerial skill in his business, hired his own employees, paid most of his expenses, and maintained his own Keogh retirement plan. Additionally, Wolcott was paid commission, reported to the IRS that he was self-employed, and was not eligible for regular employee benefits such as vacation or sick leave.

The facts of the present case are virtually indistinguishable from Wolcott. Plazzo owned and maintained his own office building. He exercised managerial skill in operating his business. He hired, paid, and established a health insurance plan for his employees. He maintained bank accounts to pay the monthly expenses of operating his business. He was paid on a commission basis and reported to the IRS that he was self-employed. He maintained his own Keogh

retirement plan. Thus, we conclude that Plazzo, like Wolcott, was an independent contractor, not an employee for the purposes of ERISA. Accordingly, the judgment of the district court is reversed.

ISSUED AS MANDATE: February 27, 1990
COSTS: None

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

A. F. PLAZZO
and
PLAZZO INSURANCE SERVICES, INC.,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE LIFE INSURANCE COMPANY,
NATIONWIDE GENERAL INSURANCE COMPANY,
and NATIONWIDE PROPERTY & CASUALTY COMPANY,

Respondents.

APPENDIX C

No. 88-4016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

A.F. PLAZZO, ET AL.,	)	F I L E D
	)	FEB 16 1990
Plaintiffs-Appellees,	)	
v.	)	LEONARD GREEN, Clerk
	)	
NATIONWIDE MUTUAL INSURANCE COMPANY,	)	
	)	
Defendant-Appellant,	)	
	)	
NATIONWIDE MUTUAL FIRE INS. CO., ET AL.,	)	O R D E R
	)	
Defendants	)	
	)	

BEFORE: KEITH and BOGGS, Circuit Judges; and PECK, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

_____

Leonard Green, Clerk

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

A. F. PLAZZO
and
PLAZZO INSURANCE SERVICES, INC.,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE LIFE INSURANCE COMPANY,
NATIONWIDE GENERAL INSURANCE COMPANY,
and NATIONWIDE PROPERTY & CASUALTY COMPANY,

Respondents.

APPENDIX D

David C. WOLCOTT, Plaintiff-Appellee, Cross-Appellant,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Nationwide General Insurance Company, and Nationwide Property & Casualty Company, Defendants-Appellants, Cross-Appellees.

Nos. 87-3846, 87-3870

United States Court of Appeals Sixth Circuit

Argued Aug. 25, 1988.

Decided Aug. 24, 1989.

Insurance agent filed suit to recover pension benefits allegedly owed to him and to obtain declaratory relief. The United States District Court for the Southern District of Ohio, 664 F.Supp. 1533, James L. Graham, J., held that agent was "employee" under ERISA, that different compensation plan was employee benefit plan under ERISA, and that termination of expended earnings benefits was not a breach of contract. The Court of Appeals, Nathaniel R. Jones, Circuit

Judge, held that: (1) agent violated his agent's agreement as a result of the actions of his "subagents" who attempted to induce policyholders to replace their policy; (2) agent violated noncompetition clause of agent's agreement; and (3) commissioned insurance agent was not "employee" of insurance company for purposes of ERISA and ERISA vesting provisions.

Affirmed in part and reversed in part.

1. Husband and Wife - 21

Insurance - 84 (1)

Commissioned insurance agent was directly responsible for actions of his wife who, while employed at agency, attempted to induce agent's policyholders to replace their policies with another policy provided by company formed by agent's wife and daughter, particularly in light of agent's agreement to take responsibility for actions of solicitors appointed to him; thus, agent was responsible for attempt to induce

policyholders to replace their policy, rendering insurer's termination of agent's agreement unqualified, so as to forfeit agent security compensation plan benefits.

2. Contracts - 312(4)

Commissioned insurance agent who went into competition with insurer within a year of the termination of his agent's agreement, and solicited or attempted to induce his former clients from his former office, violated noncompetition provisions of his agent's agreement.

3. Pensions - 121

A commissioned insurance agent was not an "employee" of an insurance company for purposes of ERISA and its vesting provision; record showed that agent was an independent contractor who hired his own employees, exercised managerial skill in the operation of his business, maintained his own office, and was paid on commission. Employee Retirement Income Security Act of 1974,

§§ 3(2)(A), (6), 201(2), 502(a), 29 U.S.C.A. §§ 1002(2)(A), (6), 1051(2), 1132(a).

See publication Words and Phrases for other judicial constructions and definitions.

Larry H. James (argued), Crabbe, Brown, Jones, Potts & Schmidt, Columbus, Ohio, for defendants-appellants, cross-appellees.

James W. Lewis, Lewis & Spencer, and C. William Brownfield (argued), Brownfield Law Offices, Columbus, Ohio, for plaintiff-appellee, cross-appellant.

John D. Luken, Nationwide Ins., Cincinnati, Ohio, Richard E. Panza, Mark P. Altieri, Richard A. Naegele, Wickens, Herzer & Panza, P.A., Lorain, Ohio, and Anne M. Richard and B. Lee Willis, Hazel, Thomas, Fiske, Beckhorn & Hanes, P.C., Alexandria, Va., for amicus curiae.

Before JONES and GUY, Circuit Judges, and HILLMAN, Chief District Judge. (The Honorable Douglas W. Hillman, United States District Court for the Western District of Michigan, sitting by designation.)

NATHANIEL R. JONES, Circuit Judge.

Defendants-appellants, Nationwide Mutual Insurance Company, et al. (Nationwide), appeal from the judgment of the district court granting plaintiff-appellee, David Wolcott's (Wolcott), motion for summary judgment. Because we hold that Wolcott is not Nationwide's "employee" within the meaning of Title I of the Employee Retirement Income Act of 1974, 29 U.S.C. § 1001, et seq. (ERISA), we reverse the judgment of the district court.

I.

From 1962 until April 1982, Wolcott was a commissioned insurance agent for Nationwide in Easton, Maryland. Wolcott operated his Nationwide agency under the name David C.

Wolcott Agency (Wolcott Agency). During that period, Wolcott represented Nationwide exclusively, i.e. he was authorized to write policies only for Nationwide unless he received the express prior approval of Nationwide to write a policy through another carrier. Except for a two year period in the 1960's, Wolcott was compensated through commission.

The relationship between Wolcott and Nationwide was governed by a written contract (Agent's Agreement or Agreement) which was renewed and revised over the years. The Agent's Agreement included the terms and conditions of the Agents Security Compensation Plan (ASCP) which Nationwide created in 1969. The ASCP consisted of two programs known as the "Deferred Compensation Incentive Plan" and the "Extended Earnings Plan." Under the Deferred Compensation Plan, Nationwide maintained a retirement account for Wolcott and annually credited to that

account, beginning after his fifth year of service, a sum based on their original and renewal service fee earnings for insurance policies. Under the Extended Earnings Plan, Nationwide agreed to pay Wolcott upon his retirement, termination, death, or disability, a sum equal to earnings from renewal fees over the prior twelve months.

The Agent's Agreement provided that in order for the agent to be entitled to payment of the ASCP, the cancellation of the Agent's Agreement must be "qualified."[6] In particular, the Agent's Agreement stated that Nationwide's obligation to pay benefits under the ASCP would terminate if a former agent engaged in competition with Nationwide within one year of the cancellation of the Agent's

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[6]A "qualified cancellation is defined in the Agent's Agreement as any cancellation of the agreement unless the agent has "induc[ed] or attempted to induce-either directly or indirectly-any policy holder to lapse, cancel, or replace any insurance in force with the Companies." J.App. at 31.

Agreement with nationwide and within a twenty-five mile radius of the former business location of the agent. Nationwide's obligation would also cease if the former agent, at any time after the cancellation of the Agent's Agreement with Nationwide, induced a Nationwide policyholder to cancel a contract with nationwide. The Agent's Agreement between Nationwide and Wolcott further provided that either party had the right to cancel the contract at any time after written notice.

The parties dispute the facts leading up to the cancellation of the Agent's Agreement. However, it is undisputed that in 1981 Wolcott's wife and daughter formed a company under the business names Wolcott and Associates and Corporate Risk Specialists ("Corporate Risk Specialists"), which was located at the same address and phone number as the Wolcott Agency. Wolcott's wife and daughter remained employed at the Wolcott

Agency. Corporate Risk Specialists solicited and wrote policies for insurance companies other than Nationwide.

In April 1981, Corporate Risk Specialists sent George and Kathryn Hart a letter which advised them that their agency was then representing additional major insurance companies. Although the Harts were Nationwide policyholders, Corporate Risk Specialists enclosed with the letter a replacement insurance policy from a carrier other than nationwide. The letter signed by Wolcott and Associates thanked the Harts for their past business and the loyalty they had displayed over the years. Apparently the letter came to Nationwide's attention when the Harts inquired about their Nationwide policy. On april 29, 1982, Wolcott was notified about the letter by his Nationwide regional sales manager. When asked about the circumstances regarding the letter to the Harts, Wolcott denied any responsibility for

the actions of his wife and daughter. Nationwide then cancelled Wolcott's Agent's Agreement, and Wolcott sought review of this decision by an internal administrative review board. In May 1982, Wolcott formally joined Corporate Risk Specialists and thereafter wrote and solicited policies for carriers other than Nationwide. Subsequently, Nationwide affirmed the unqualified cancellation of Wolcott's Agent's Agreement, and Wolcott received notification of this decision in June 1982. Wolcott thereafter inquired about his benefits under the ASCP and was notified by Nationwide that he was ineligible because of his violation of the forfeiture clause.

On April 27, 1984, Wolcott filed this instant action under 29 U.S.C. § 1132(a), which provides that a participant, as a beneficiary of an employee retirement income security plan, may bring a civil action to enforce provisions of the Act and recover

benefits due him. Wolcott sought in particular to enforce the Act's nonforfeitability requirements and to recover benefits claimed to be due him under the ASCP.

Wolcott moved for summary judgment, and Nationwide filed a cross-motion for summary judgment claiming that Wolcott voluntarily forfeited any right he may have had to the claimed benefits. The district court held that Wolcott is an "employee" under ERISA, and that the Deferred Compensation Plan is a "pension benefit plan" which is not exempted from ERISA nonforfeitability requirements. The district court determined, however, that the Extended Earnings Plan is not a pension benefit plan under ERISA and therefore is not governed by the nonforfeiture provisions. Finally, the district court held that Wolcott does not have the right to enforce payment of benefits under the Deferred Compensation Plan until

he reaches the age of 65 and, therefore, that his wife would have no survivorship rights in any benefits under the Deferred Compensation Plan should Wolcott die prior to reaching the age of 65.

Following the parties' receipt of the district court's judgment of July 15, 1987, both parties filed timely motions to alter and amend pursuant to Federal Rule of Civil Procedure 59(e). On August 12, 1987, the district court rendered a second memorandum and order. The district court denied Nationwide's motion and granted Wolcott's motion, in part, by clarifying his rights under ERISA with regard to the Deferred Compensation Plan in the event of his death or disability.

II.

We first address Wolcott's contention that the district court erred by granting summary judgment in favor of Nationwide because there exists a genuine issue of

material fact concerning Nationwide's claim that he breached the Agent's Agreement. A district court should grant summary judgment only if the "pleadings, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). This court applies the same test as used by the district court in reviewing a motion for summary judgment. Gutierrez v. Lynch, 826 F.2d 1534, 1536 (6th Cir. 1987).

In support of his contention that there is a genuine issue of material fact regarding the alleged breach of the Agent's Agreement, Wolcott argues that the district court erroneously found that he had violated his Agent's Agreement as a result of the actions

of his "subagents," Ruth Wolcott and Theresa Hurka. Wolcott contends that his wife and daughter were never authorized agents for Nationwide and, in fact, only worked as paid employees for the Wolcott Agency. While conceding that he was responsible for the activities of his subagents at the Wolcott Agency, Wolcott claims that he was not responsible for their activities at Corporate Risk Specialists.

Wolcott further argues that he was not associated with Corporate Risk Specialists prior to his "unqualified" termination, and asserts that this proposition is supported by the testimony of both his wife and daughter. Moreover, Wolcott contends that he never referred any current or prospective Nationwide clients to Corporate Risk Specialists or any other agency prior to April 29, 1982, and at no time during his almost twenty year association with Nationwide did he sell insurance coverage for

any other carrier without Nationwide's express prior approval.

Wolcott concludes that Nationwide breached the Agent's Agreement by virtue of its "unqualified" termination, and the consequent forfeiture of the ASCP benefits. Thus, Wolcott asserts that because of Nationwide's breach, he was justified in his subsequent competitive activities which fell within the provision of paragraphs 11(f)(1) and (3).

Confining our discussion to Wolcott's challenge to the district court's grant of summary judgment for Nationwide on the unqualified termination of plaintiffs Agent's Agreement, we note that the terms of the Agreement with respect to the payment of ASCP benefits are clear. Specifically, paragraph 11(e) of the Agreement provides: "unless you have induced or attempted to induce, either directly or indirectly, policy holder to lapse, cancel, or replace any insurance

contract in force with the companies, the cancellation of this Agreement shall be a qualified cancellation for the purpose of this Agreement." Paragraph 11(f) clearly provides that Nationwide has no liability to make payments under the ASCP if: (1) an agent directly or indirectly represents another insurance carrier within a 25-mile radius of his Nationwide location during the first year following termination of the Agent's Agreement; (2) retains Nationwide records; and (3) directly or indirectly induces Nationwide policyholders to transfer their policies to different carriers.

[1] The principal issue therefore is whether Wolcott violated paragraphs 11(e) and (f) of the Agent's Agreement. In this case, after reviewing the evidence, the district court determined that Nationwide was entitled to summary judgment. Our review of the evidence persuades us that the district court did not err by granting summary judgment in

favor of the defendants on the breach of contract claim. The evidence shows, notwithstanding Wolcott's protestations to the contrary, that Wolcott was directly responsible for the actions of his subagent, Ruth Wolcott, who, while employed at the Wolcott Agency, attempted to induce Nationwide policyholders to replace their policy with another policy provided by Corporate Risk Specialists. Further, Wolcott's disclaimer of responsibility for the activities of his subagents is effectively countered by the affidavit of George Frink, Nationwide's Vice-President for Marketing Services, which provides that in consideration of Nationwide's certification of a solicitor under state law, "Nationwide has asked that the independent contractor agent take full responsibility for the actions of any solicitors appointed to him." Affidavit of George W. Frink at 2. Because Wolcott was charged by contract with

accepting responsibility for the actions of his subagents, we find that Wolcott was directly responsible for the actions of his wife and daughter and, therefore, we agree with the district court's conclusion that Wolcott "attempted to induce policyholders to replace their policy within the meaning of paragraph 11(e). . . ." J.App. at 18. Thus, we find that the district court did not err by concluding that Nationwide's cancellation of the Agreement was "unqualified."

[2] With regard to paragraph 11(f), the forfeiture provision of the Agent's Agreement, it is undisputed that Wolcott violated subsections (1) and (3). The district court properly found that Wolcott, in May 1982, joined Corporate Risk Specialists at the same location where he sold Nationwide policies for the Wolcott Agency. Because Wolcott went into competition with Nationwide within a year

of the termination of his Agent's Agreement and because he solicited or attempted to induce his former Nationwide clients from his former office, the district court properly held that Wolcott violated the provisions of 11(f)(q) and (e) of the Agreement. We find that this conclusion is supported by Wolcott's admission that he engaged in competitive activity in May 1982, see Appellee's Br. at Appendix, I, J, K and Ruth Wolcott's testimony, Appellee's Br. at Appendix L 1-7. Therefore, because we have been unable to ascertain specific facts in the affidavits, depositions, and other admissions and documents in the record showing that there is a genuine issue of material fact for trial, we affirm the district court's judgment on the contract claim.

III.

Nationwide argues that the district court erred in concluding that Wolcott was

an "employee" for ERISA purposes. Because Wolcott is not an "employee," Nationwide contends that the ASCP forfeiture provisions may be enforced against him because he has failed to satisfy the vesting requirements of ERISA.

The ERISA's vesting requirements are applicable only if: (1) Wolcott is Nationwide's "employee" within the meaning of ERISA; (2) the ASCP is a "pension benefit plan" within the meaning of ERISA; and (3) the ASCP is not a "top hat plan" which is exempted from the ERISA's vesting requirements.[7] 29 U.S.C. §§ 1132(a), 1002(2)(A), 1002(6) and 1002(7); see also Fraver v. North Carolina Farm Bureau Mutual Insurance Co., 801 F.2d 675, 676-78 (4th Cir.

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[7]A "top hat plan" is defined as "a plan which is unfunded and is maintained by an employer primarily for the purposes of providing deferred compensation for a select group of management or highly compensated employees." 29 U.S.C. §1051(2).

1986), cert. denied, 480 U.S. 919, 107 S.Ct. 1375, 94 L. Ed.2d 690 (1987).

In order to successfully maintain an action predicated on section 502(a) of ERISA, 29 U.S.C. § 1132(a), Wolcott must qualify as a "participant" in an employee benefit plan. See Darden v. Nationwide Mutual Insurance, 796 F.2d 701, 707 (4th Cir. 1986). Under ERISA, a "participant" is defined as "any employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer. . . ." 29 U.S. § 1002(7). ERISA tersely defines "employee" as "any individual employed by an employer." 29 U.S.C. § 1002(6). As noted by the Fourth Circuit in Darden, 796 F.2d at 704, and by the D.C. Circuit in Holt v. Winpisinger, 811 F.2d 1532, 1538 (D.C. Cir. 1987), the statute provides scarce guidance for determining whether an individual should be treated as an "employee" for ERISA purposes.

The district court, in determining whether Wolcott was Nationwide's "employee" for ERISA purposes, applied a "totality of the circumstances" test. Under this test, the district court considered not only traditional common law agency factors, but also the additional factors enunciated in the Fourth Circuit's decision in Darden. The Darden court rejected the common law standard for defining "employee," and instead construed the term "'in light of the mischief [sought] to be corrected and the end [sought] to be attained'" by ERISA. 796 F.2d at 706 (quoting United States v. Silk, 331 U.S. 704, 713, 67 S.Ct. 1463, 1468, 91 L.Ed. 1757 (1947)). Relying in part upon Congress's concern, as expressed in ERISA, that "many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such [employee benefit] plans," 29 U.S.C. § 1001(a), the Darden court reasoned that the

class of protected persons under ERISA should include: (1) persons who had a reasonable expectation of retirement benefits; (2) persons who relied on that expectation; and (3) persons who lacked sufficient economic bargaining power to contract for nonforfeitable benefits. Id. at 706-7. Citing Darden, the district court concluded that "[Wolcott] is a member of the class of people which Congress sought to protect in enacting ERISA" and, therefore, that he was an "employee" of Nationwide within the meaning of ERISA. J.App. 48.

[3] Nationwide argues that the district court's decision is contrary to the weight of authority, and that the district court erred in applying the Darden test and, thereby, departing from the traditional common-law agency factors. We agree. In our view, the better reasoned position on meaning of the term "employee" is set forth in Holt, 811 F.2d at 1532. The Holt court held that,

because of the absence of a comprehensive statutory definition, "one must look to common-law rules of agency" to determine "employee" status under ERISA. Id. at 1538, n.44. The court observed in Holt that:

> [t]he absence of a comprehensive definition of "employee" in ERISA and other features of that legislation indicate plainly enough that Congress intended the Secretary of the Treasury and the Secretary of Labor, who were the administrators of various ERISA provisions, to continue their practice of defining "employee" in terms of common-law agency principles.

811 F.2d at 1538, n. 44. (citations omitted). Further, the Holt court recognized that the Secretary of the Treasury has issued regulations to implement the ERISA's tax provisions, including the vesting requirements of section 411 of the Internal Revenue Code, which regulations also apply

to the minimum vesting requirements under the labor law provisions of ERISA. Id. (citing 29 U.S.C. § 1202(c)). The pertinent Treasury Regulations provide that "[e]very individual is an employee if under the usual common-law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee." 26 C.F.R. 31.3121(d)1(c)(1) (1988).

Finally, the Holt court observed that under ERISA, the Labor Department may not adopt vesting regulations which are inconsistent with the Internal Revenue Code. 811 F.2d at 1538, n.44

We concur in the Holt court's position that common-law rules of agency are properly applied under ERISA. The traditional common-law criteria that courts have employed include: 1) the degree of control and supervision over the manner in which the work is performed; 2) whether or not the "employee" is engaged in his own business"

3) the company's right to hire and discharge the persons doing the work; 4) the method of compensation to the "employee"; 5) whether the "employee" receives the same benefits as the company's regular employees; 6) who has control of the premises where the work is done; 7) how the parties structure their Social Security and income relations; 8) whether the "employee" stands to make a profit on the work of those working for him; 9) the amount of the "employee's" investment in facilities and equipment; 10) the belief of the parties as to their business relationship; 11) the amount of skill required in the particular occupation; and 12) the duration of time for which the "employee" is employed. See Holt, 811 F.2d at 1539-40 (citing Restatement (Second) of Agency § 220(2) (1958)); Short v. Central States, Southeast and Southwest Pension Fund, 729 F.2d 567 (8th Cir. 1984), Wardle v. Central States, Southeast and Southwest

Pension Fund, 627 F.2d 820, 824 (7th Cir. 1980), cert. denied, 449 U.S. 1112, 101 S.Ct. 922, 66 L.Ed.2d 841 (1981).

Applying these factors, we find that Wolcott was not Nationwide's "employee" within the meaning of ERISA, but rather was an independent contractor. The record shows that Wolcott hired his own employees and exercised managerial skill in the operation of his business. Further, Wolcott owned his own office condominium; maintained the office where the business was located; was responsible for most all of his own expenses; paid his own insurance; and was responsible for obtaining and maintaining a license to sell insurance. Further, he was paid on commission, and Nationwide made no deductions for Social Security or income taxes. In fact, Wolcott was responsible for reporting his own self-employed income to the Internal Revenue Service ("IRS"). He reported his commission income and business expenses to

the IRS as self-employed income. Moreover, the Agent's Agreement stated that Wolcott was an independent contractor and not an employee. In addition, Wolcott was not eligible for regular employee benefits, including sick pay, vacation pay, and leave time, or any of the employee pension or retirement plans provided to Nationwide's regular employees. Finally, Wolcott admitted that he maintained his own Keough retirement plan. Given these undisputed facts, we conclude that Wolcott was not Nationwide's "employee" within the meaning of ERISA.

IV.

For the above-stated reasons, we AFFIRM the decision of the district court regarding Nationwide's termination of the Agent's Agreement. However, we REVERSE the district court's decision finding that Wolcott is an "employee" under ERISA and, accordingly, hold that the ASCP forfeiture provisions may be enforced against him because he has failed to satisfy the vesting requirements of ERISA.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

A. F. PLAZZO
and
PLAZZO INSURANCE SERVICES, INC.,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE LIFE INSURANCE COMPANY,
NATIONWIDE GENERAL INSURANCE COMPANY,
and NATIONWIDE PROPERTY & CASUALTY COMPANY,

Respondents.

APPENDIX E

David C. WOLCOTT, Plaintiff

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, et al., Defendants.

No. C-2-84-854.

United States District
S.D. Ohio, E.D.

July 15, 1987.

On Motions to Alter and Amend Judgment
Aug. 12, 1987.

MEMORANDUM AND ORDER

GRAHAM, District Judge

. . . .

(Excerpt) The first issue to be resolved is whether plaintiff is an "employee" within the terms of ERISA. The definition of "employee" found in 29 U.S.C. § 1002(2)(B)(6) states simply that "The term 'employee' means any individual employed by an employer." This definition provides little insight into the problem. Therefore, courts have turned to other sources in determining whether an individual is an employee under ERISA.

The courts in Short v. Central States, Southeast and Southwest Areas Pension Fund, 729 F.2d 567 (8th Cir. 1984) and Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980) looked to traditional common law tests for determining whether an individual was an employee or an independent contractor in the pension plan context.

Additional guidance is provided by decisions of the United States Supreme Court interpreting the term "employee" as used in other regulatory legislation. Those decisions hold that the term "employee" is to be construed in light of the purpose of the statute, that is, the mischief to be corrected and the end to be attained. See e.g. United States v. Silk, 331 U.S. 704, 713, 67 S.Ct. 1463, 1468, 91 L.Ed. 1757 (1947); NLRB v. Hearst Publications, 322 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944). Basically, the total situation must be

considered in making this determination, and any one factor is not controlling. United States v. Silk, supra, 331 U.S. at 719, 67 S.Ct. at 1471.

Factors in making this determination include, but are not limited to: 1) the nature and degree of control retained by the employer; 2) the degree of supervision retained by the employer over the details of the work; 3) the extent to which services are an integral part of the employer's business or a distinct business; 4) the duration of the relationship; 5) who supplies the place or instrumentalities of work; 6) the method of payment; 7) the "employee's" opportunity for loss or profit; 8) the amount of initiative, skill, judgment or foresight required of the "employee" for the success of the enterprise; 9) the right to discharge; 10) whether the "employee" is engaged in a business apart from the business of the employer; 11) whether an "employee" can hire

and control his own employees; and 12) whether the employer withholds taxes or pays social security for the "employee".

The court in Darden v. Nationwide Mutual Insurance Co., 796 F.2d 701 (4th Cir. 1986) formulated additional tests specifically directed toward the analysis of whether an individual is an employee for purposes of ERISA. These standards are as follows: 1) the "employee" must anticipate retirement benefits, or in other words, the employer must have taken some action that created a reasonable expectation on the "employee's" part that benefits would be paid in the future; 2) the "employee" must have relied on these expectations by remaining a substantial period of time with the employer and by foregoing other significant means of providing for his or her retirement; and 3) the "employee" must lack sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits. Id. at 706-707.

The circumstances relevant to the present case, as set forth in the Agent's Agreement and the affidavits and depositions on file, are basically undisputed and reveal no genuine issue of material fact. The Agent's Agreement states that plaintiff was an independent contractor. Plaintiff was required to arrange for his own office space and hire and control his own office employees. He was responsible for his own office expenses and for securing and keeping a license to sell insurance. He was paid on a commission basis rather than by salary except for his first two years as an agent. Thus, the amount of profit made by plaintiff depended largely upon his own skill, judgment and initiative. Plaintiff was free to exercise his own judgment as to the time and manner of sales. Agents such as plaintiff were not eligible to participate in defendants' employee pension or profit sharing plans and did not receive vacation

or sick pay. The defendant companies did not withhold income taxes or pay social security taxes for agents such as plaintiff. Plaintiff was responsible for purchasing his own health insurance, although Nationwide offered a group policy which agents could opt to buy. Plaintiff prepared the income tax return for his agency as a business. Either party to the Agent's Agreement had a right to cancel at any time upon written notice.

The record further reveals that defendants provided forms to the agent which remained the property of the company. Plaintiff was listed in the yellow pages of the phone book as a Nationwide Agent and had a Nationwide sign outside his office. Defendants offered training sessions which agents were supposedly free to attend or not as they pleased. However, plaintiff's unrefuted statement in his deposition indicates that as a practical matter, the district manager would admonish him for not

attending such meetings. Educational courses were paid for by the defendants. Agents were eligible to join defendants' employee credit union after two years. Failure to keep sales up could result in cancellation of the Agent's Agreement. The business of the agent, selling insurance, was an integral part of the defendants' business. Plaintiff was exclusively a Nationwide agent, and he had no business distinct from that of the defendants unless they authorized him to sell an insurance policy through other companies.

In regard to the additional factors set forth in Darden v. Nationwide Mutual Insurance Co., supra, the record reveals that defendants, by incorporating the Agent's Security Compensation Plan into the Agent's Agreement, created a reasonable expectation that benefits would be forthcoming in the future. Plaintiff relied on that expectation by remaining an agent for the defendants from 1963 to 1982 (excluding the period between

1965 and 1967 when he was a district manager for defendants). Plaintiff also maintained an individual retirement account in the form of a Keough Plan. Defendants' agents were advised to secure such individual plans for retirement. The record demonstrates that on those occasions when plaintiff objected to changes which were made in the terms of the Agent's Agreement, he was told to sign it as it was written or he did not have a contract, thus indicating little bargaining power on plaintiff's part.

[1] Weighing the totality of the circumstances in the present case, the Court has reached the conclusion that plaintiff is a member of the class of people which Congress sought to protect in enacting ERISA, and that plaintiff is an employee for purposes of ERISA.

. . . .

ON MOTIONS TO ALTER AND AMEND JUDGMENT

Plaintiff and defendants have both filed motions under Fed.R.Civ.P. 59 to alter and amend the judgment issued in this case

on July 15, 1987.

Defendants renew their argument that plaintiff is an independent contractor. They rely upon Harlow v. Nationwide Mutual Insurance Company, Case No. N-84-503, (D.Conn.), decided June 19, 1987, in which the district court found that the plaintiffs, Nationwide agents, were independent contractors. The court in Harlow advocated the use of the common law test for determining whether a person is an employee as well as examining the remedial purposes of ERISA, the test adopted by the court of appeals in Darden v. Nationwide Mutual Insurance Co., 796 F.2d 701 (4th Cir. 1986).

This court, in arriving at its decision as to the nature of plaintiff's status, employed a "totality of the circumstances" test as suggested by the United States Supreme Court decisions concerning regulatory legislation. See e.g. United States v. Silk, 331 U.S. 704, 713, 67 S.Ct. 1463, 1468, 91 L.Ed. 1757 (1947). Thus, this court considered a variety of traditional common

law factors in addition to the three part test employed in Darden. The determination of the status of any plaintiff as an employee or independent contractor under ERISA of necessity must rest on a case-by-case determination. The court, upon due consideration of the additional authorities and argument presented by defendants, adheres to its original finding that based upon all the circumstances in the present case, plaintiff was an "employee" for purposes of ERISA.

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

A. F. PLAZZO
and
PLAZZO INSURANCE SERVICES, INC.,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE LIFE INSURANCE COMPANY,
NATIONWIDE GENERAL INSURANCE COMPANY,
and NATIONWIDE PROPERTY & CASUALTY COMPANY,

Respondents.

APPENDIX F

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29 U.S.C. § 1001.

Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations,

and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of

current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their

beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with

significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

. . .

29 U.S.C. § 1002. Definitions

For purposes of this subchapter:

. . .

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

. . .

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an

employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

. . .

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

. . .

29 U.S.C. §1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

. . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

. . .

(3) by a participant, beneficiary, or fiduciary . . . (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

. . .

No. 89-1499

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

A.F. PLAZZO

and

PLAZZO INSURANCE SERVICES, INC.,
Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE LIFE INSURANCE COMPANY,
NATIONWIDE GENERAL INSURANCE COMPANY, and
NATIONWIDE PROPERTY AND CASUALTY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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April 20, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the status of an independent-contractor insurance agent as an "employee" for purposes of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), should be determined by reference to common-law agency principles?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1499

A.F. PLAZZO

and

PLAZZO INSURANCE SERVICES, INC.,

Petitioners,

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NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
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NATIONWIDE PROPERTY AND CASUALTY COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Nationwide General Insurance Company and Nationwide Property and Casualty Company (collectively, "Nationwide")[1] hereby submit

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[1] Pursuant to Rule 29.1 of the Court's Rules, a list setting forth the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Respondents is included as an Appendix to this Brief. References to "App." are to the Appendix included with the Petition.

their Brief in Opposition to the Petition for Writ of Certiorari filed by A.F. Plazzo and Plazzo Insurance Services, Inc. (collectively, "Petitioners") in the above-named case.

This case concerns the applicability of Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), to an incentive compensation arrangement provided by Nationwide to certain of its insurance agents, including Petitioners. That arrangement includes a conventional provision that imposes a financial penalty (loss of future payments) in the event the agent engages in contractually specified competitive activities. Nationwide believes that ERISA is inapplicable to this arrangement because, *inter alia*, Petitioners were not "employees" of Nationwide within the meaning of ERISA, which is a predicate to application of that statute. While the standard for determining "employee" status under ERISA is an important federal question, the court of appeals below properly applied common-law agency principles in making that determination, and there is not yet a clear conflict among the courts of appeals on this question. Accordingly, this Court should deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in this matter, filed December 22, 1989, is included in Appendix B to the Petition at 81-90 and is reported (as a reversal without a published opinion) at 892 F.2d 79. That decision reversed the decision of the United States District Court for the Northern District of Ohio, decided October 21, 1988, which is reported at 697 F. Supp. 1437 and is included in Appendix A to the Petition at 24-80.

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are set forth at pages 1-2 of the Petition.

STATUTES INVOLVED

Section 3(6) of Title I of ERISA, 29 U.S.C. § 1002(6) (1982), provides: "The term 'employee' means any individual employed by an employer."

STATEMENT OF THE CASE

Nationwide is engaged in the business of underwriting insurance risks. It enters into agency relationships with sales agents to place its policies. That relationship is governed by an Agent's Agreement between Nationwide and the agent. The Agreement specifies that the agent is to act in the capacity of an independent contractor. App. 27, 82.

In 1961, Petitioner A.F. Plazzo ("Plazzo") became an insurance agent for Nationwide and continued in that capacity until 1983. Plazzo's relationship with Nationwide was governed by a series of successive Agent's Agreements. The district court below found, and the court of appeals affirmed, that pursuant to the Agreements, Plazzo maintained his own business, including providing his own office space and hiring his own employees. He exercised managerial skill in operating his business, determining the manner and means by which he attempted to sell insurance policies. He maintained bank accounts to pay the expenses of operating his business. He established a health insurance plan and a Keogh retirement plan for himself and his employees. Nationwide paid Plazzo solely on a commission basis, and Plazzo reported to the Internal Revenue Service that he was self-employed. Plazzo enjoyed such success as an insurance agent that, in 1980, he took his son into his business and built his own office building. In 1982, Plazzo formed a corporation, Plazzo Insurance Services, Inc. ("PISI"). Plazzo arranged with Nationwide to terminate his individual Agent's Agreement and replace it with an agency agreement between PISI and Nationwide. App. 27-28, 64-70, 82-83, 89-90.

The Agent's Agreement was modified in 1969 to provide an additional form of agent compensation, currently referred to as the Agents Security Compensation Plan ("ASCP"). The ASCP was designed to provide an incentive to agents to increase Nationwide policy sales, and was conditionally payable after termination of the agency with Nationwide. The Agreement expressly provided that ASCP payments would not be made if the former agent engaged in the insurance business within a 25-mile radius of his Nationwide location during the first year following agency termination, or in certain other circumstances. App. 26-27, 84-85.

In 1983, Nationwide properly exercised its right to cancel its Agreement with PISI. Nationwide subsequently determined that Plazzo's son, with the assistance of Plazzo, was continuing in the insurance business at their Nationwide location, representing other insurance companies and inducing Nationwide policyholders to change their policies to those other companies. In accordance with the Agreement, Nationwide therefore made no ASCP payments to Plazzo or PISI. App. 28-29, 83-85.[2]

Petitioners brought an action in federal district court alleging that ERISA precluded the enforcement of the conditions for ASCP payments against them, and seeking those payments and other relief.[3] The parties agree that, if ERISA is applicable in this matter (which depends on the "employee" issue as well as certain other issues), the minimum vesting requirements of Section 203 of Title I of ERISA, 29 U.S.C. § 1053 (1982 & 1987 Supp.),

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[2] Whether Nationwide's determination was correct under the terms of the Agreement was not raised below by Petitioners. App. 29 n.5.

[3] Petitioners did not challenge the validity of the ASCP provisions under applicable state law. The ASCP conditions have been upheld by other courts as a reasonable financial penalty that neither restrains competition nor otherwise offends public policy. *See, e.g., Nationwide Mutual Insurance Co. v. Tatem*, 210 Va. 693, 173 S.E. 2d 818 (1970) (predecessor ASCP provision).

would not permit enforcement of the ASCP conditions on the facts of this case. However, that vesting requirement is applicable by its terms only to "employee pension benefit plans," which in turn are limited by statutory definition to specified arrangements for "employees." *See* ERISA § 3(2), 29 U.S.C. § 1002(2) (1982).

The district court below reasoned that "employee" status under ERISA is to be determined by reference to common-law precepts. App. 47-62. It looked to the factors of "employee" status enumerated in the Restatement (Second) of Agency § 220 (1958) ("Restatement").[4]

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[4] Section 220 of the Restatement defines "servant" as follows:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

In reviewing the facts, the district court found factors indicative of both employee and independent contractor status, but concluded that Plazzo should be treated as Nationwide's "employee" for ERISA purposes. App. 64-69. After resolving various other issues in favor of Petitioners, the district court ruled that Plazzo was entitled to ASCP payments.

On appeal, the court of appeals found it necessary to address only the ERISA "employee" issue. Subsequent to the district court's decision below, the Court of Appeals for the Sixth Circuit held that ERISA "employee" status is to be determined under the common-law standard, enumerating twelve relevant criteria. *See Wolcott v. Nationwide Mutual Insurance Co.*, 884 F.2d 245 (6th Cir. 1989) (reproduced in App. 93-120). Although the district court below applied "similar common law criteria," the court of appeals ruled that the district court had drawn the wrong legal conclusion from the facts it had found. The court of appeals held that the facts were indistinguishable from its prior decision in *Wolcott* and that Plazzo was not Nationwide's "employee," and therefore reversed the district court's judgment. App. 87-90.

REASONS FOR DENYING THE WRIT

The Petition appears to allege two reasons for this Court's review of the decision below: (1) a difference among the courts of appeals as to the standard to be applied in determining ERISA "employee" status (Petition at 12-16); and (2) failure of the court of appeals below to apply the "clearly erroneous" rule of Federal Rule of Civil Procedure 52(a) (Petition at 16-21). Neither reason has merit.

The latter contention patently does not justify this Court's review of the decision below. Petitioners' essential objection is that the court of appeals drew a different legal conclusion from the facts than did the district court. Such a contention relates solely to the manner in which the instant case was decided and raises no

legal principle worthy of this Court's decision. Furthermore, it is elementary that the court of appeals may freely review questions of law, without the deference accorded to the district court's decision by the clearly erroneous rule. *See, e.g., U.S. v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). The ultimate characterization of an individual as an employee or as an independent contractor—the legal significance of the facts found by the trier of fact—is a question of law. *See, e.g., Holt v. Winpisinger*, 811 F.2d 1532, 1536 & nn.30, 31 (D.C. Cir. 1987). The Petition cites neither conflicting decisions among the circuits nor important federal considerations on this point.

While the question of the standard to be applied in determining ERISA "employee" status may eventually merit this Court's attention, such consideration would be premature at this time. The statutory definition of "employee" in section 3(6) of ERISA, 29 U.S.C. § 1002(6) (quoted above), does not provide clear direction as to the standard to be applied. Two courts of appeals have determined that familiar common-law agency principles should govern under ERISA: the Sixth Circuit in *Wolcott, supra*, and the D.C. Circuit in *Holt v. Winpisinger*, 811 F.2d 1532, 1538 & n.44 (1987). These courts correctly observed that, under the statutory provisions for coordinating the tax and labor law titles of ERISA, tax regulations govern the ERISA vesting requirements at issue in this case[5] and those regulations adopt the common-law test of "employee" status.[6] *See Wolcott*, 884 F.2d at 250-251; *Holt*, 811 F.2d at 1538 n.44.

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[5] Section 3002(c) of ERISA, 29 U.S.C. § 1202(c), provides in relevant part that regulations prescribed by the Secretary of the Treasury under the Internal Revenue Code vesting requirements shall also apply to the counterpart vesting requirements of ERISA, and forbids the Secretary of Labor from adopting inconsistent regulations.

[6] The pertinent Treasury regulation provides that "[e]very individual is an employee if under the usual common-law rules the

In contrast, a panel of the Court of Appeals for the Fourth Circuit has concluded that "the common-law test for the relationship of master and servant is not the appropriate standard for application" under ERISA. *See Darden v. Nationwide Mutual Insurance Co.*, 796 F.2d 701, 706 (4th Cir. 1986), *on remand*, 717 F. Supp. 388 (E.D.N.C. 1989), *cross appeals pending*, Nos. 89-2759(L), 89-2760 (4th Cir.). The *Darden* case also involved the effect of ERISA on the enforceability of the ASCP conditions against a former Nationwide agent. The court of appeals in *Darden* cited *United States v. Silk*, 331 U.S. 704 (1947) (defining "employee" for purposes of the Social Security Act) and *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) (defining "employee" for purposes of the National Labor Relations Act) as authority to define "employee" in light of the purposes of the statute. The court then announced a novel, three-part test for ERISA "employee" status:

> (1) Whether the "employer" took some action that created a reasonable expectation on the "employee's" part that retirement benefits would be paid in the future;
>
> (2) Whether the "employee" relied on that expectation by remaining for "long years," or a substantial period of time, in the "employer's" service and by foregoing other significant means of providing for retirement; and
>
> (3) Whether the "employee" lacked sufficient bargaining power to obtain contractual rights to non-forfeitable retirement benefits. 796 F.2d at 706-707.

The court of appeals remanded the *Darden* case to the district court.[7] After further proceedings, the district

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relationship between him and the person for whom he performs services is the legal relationship of employer and employee." 26 C.F.R. § 31.3121(d)-1(c)(1).

[7] Nationwide's request for a rehearing, or rehearing *en banc*, in *Darden* was denied. 796 F.2d at 701.

court entered judgment in part for Nationwide and in part for the former Nationwide agent.[8] Cross appeals were taken, and the *Darden* case was again argued to the Fourth Circuit on April 3, 1990. That court's decision remains pending.

The standards for ERISA "employee" status as articulated by the Sixth and D.C. Circuits and by the Fourth Circuit are different. On its face, the *Darden* test is an unworkable standard that provides little useful guidance for distinguishing among putative "employees" and that threatens inconsistent and insupportable results in specific applications. In developing that standard, the *Darden* opinion not only neglects the relevant regulations and other authorities cited herein, but also misapplies the precedents on which it relies. This Court in *Silk* and its companion case, *Bartels v. Birmingham*, 332 U.S. 126 (1947), held that "employee" should be defined for Social Security Act purposes by common-law principles realistically applied. *See Silk*, 331 U.S. at 713-716; *Bartels*, 332 U.S. at 130.[9] This is precisely the standard adopted for ERISA purposes by the Sixth and D.C. Circuits. In *Hearst*, this Court did define "employee" under the NLRA primarily by reference to "the history, terms and purposes of the legislation" (322 U.S. at 124), much like the court in *Darden*. However, Congress subsequently repudiated that approach and reinstated common-law agency principles. *See, e.g., NLRB v. United*

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[8] In relevant part, the district court held on remand that the former agent was Nationwide's "employee" for ERISA purposes and that a portion of the ASCP (the so-called "DCIC" payments) was a "pension plan," but that the remainder of the ASCP (the "Extended Earnings" payments) was not a "pension plan" subject to ERISA. 717 F. Supp. at 391-397.

[9] *See also Enochs v. Williams Packing and Navigation Co.*, 370 U.S. 1, 3 (1962), *reh. denied*, 370 U.S. 965 (1962), noting that the Social Security provisions, as amended subsequent to *Silk* and *Bartels*, "specifically adopt the common-law test for ascertaining the existence of the employer-employee relationship."

Insurance Co., 390 U.S. 254, 256 (1968).[10] Accordingly, the *Darden* test is founded on an erroneous understanding of both ERISA and precedent.

The *Wolcott* and *Holt* interpretation of ERISA follows the conventional legal understanding of the term "employee."[11] It accords with several decisions in which this Court has concluded that "when Congress has used the term 'employee' without defining it, . . . Congress intended to describe the conventional master-servant relationship as understood by common law agency doc-

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[10] The legislative history of the NLRA amendment graphically states the view of Congress that the proper test from the outset had been the common-law test:

> An "employee", according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. . . . It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up [in its administrative decision in *Hearst*]. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors". . . . It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words no farfetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee". [H. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947), *reproduced in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 292, 309 (1948).]

[11] It is a basic precept of statutory interpretation that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

trine." *Community for Creative Non-Violence v. Reid*, —— U.S. ——, 104 L. Ed. 2d 811, 824, 109 S. Ct. 2166, 2172 (1989) (adopting common-law principles to define "employee" for purposes of the "work made for hire" provisions of the Copyright Act of 1976).[12] The *Holt* and *Wolcott* interpretation also conforms to the federal labor laws generally, which define "employee" status by reference to common-law agency principles.[13] Finally, that interpretation best reflects the legislative history of ERISA. The concerns reported to and evinced by Congress during its extensive hearings[14] and reports[15]

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[12] For cases reaching the same conclusion under the Federal Employers Liability Act, see, *e.g.*, *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-323, (1974), and the cases cited therein.

[13] *See, e.g., NLRB v. United Insurance Co., supra*, 390 U.S. at 256 (NLRA); *Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 872 (D.C. Cir. 1978) (noting that the National Labor Relations Board has adopted common-law test).

[14] Hearings on Private Pension Plans before the Subcommittee on Fiscal Policy of the Joint Economic Committee, 89th Cong., 2d Sess. (April-May 1966); Hearings on H.R. 1045, H.R. 1046 and H.R. 16462 before the General Subcommittee on Labor of the House Committee on Education and Labor, 91st Cong., 1st and 2d Sess. (December 1969, February-May 1970); Hearings on H.R. 1269 before the General Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 1st Sess. (April 1971); Hearings on Tax Proposals affecting Private Pension Plans before the House Committee on Ways and Means, 92d Cong., 2d Sess. (May 1972); Hearings on S. 3598 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. (June 1972); Hearings on S. 4 and S. 75 before the Subcommittee on Labor and Public Welfare, 93d Cong., 1st Sess. (Feb. 1973); Hearings on H.R. 2 and H.R. 462 before the General Subcommittee on Labor of the House Committee on Education and Labor, 93d Cong., 1st Sess. (Feb.-April, June 1973); Hearings before the Subcommittee on Private Pension Plan Reform of the Senate Committee on Finance, 93d Cong., 1st Sess. (May-June 1973).

[15] S. Rep. No. 127, 93d Cong., 1st Sess. (1973); S. Rep. No. 383, 93d Cong., 1st Sess. (1973); H. Rep. No. 533, 93d Cong., 1st Sess. (1973); H. Rep. No. 779, 93d Cong., 2d Sess. (1974); H. Rep. No.

preceding the enactment of ERISA in 1974 related to traditional private pensions for employees at common law or covered by collective bargaining agreements. *See generally Schwartz v. Gordon*, 761 F.2d 864, 868 (2d Cir. 1985). Nothing in the text of this "comprehensive and reticulated statute"[16] indicates that Congress intended any other meaning.

Accordingly, *Wolcott* and *Holt* represent the better-reasoned interpretation of ERISA. Common-law agency principles are the proper standard for determining the status of an individual as an "employee" under ERISA, and that standard should be followed in all the circuits.

At this time, however, it is unclear whether the inappropriate "employee" formulation in *Darden* will result in decisions inconsistent with common-law agency principles. The Fourth Circuit is currently considering application of the *Darden* standard in the very case in which that standard was announced. In resolving the pending appeal, the Fourth Circuit may well clarify or elaborate its prior opinion in *Darden*. For example, Nationwide has argued on appeal that the "reliance" element of the Fourth Circuit test properly takes cognizance of the entrepreneurial opportunities of the putative "employee," a consideration akin to the common-law

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1280, 93d Cong., 2d Sess. (1974) (conference report); S. Rep. No. 1090, 93d Cong., 2d Sess. (1974) (conference report).

[16] *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980), *reh. denied*, 448 U.S. 908 (1980). This Court has consistently declined to modify judicially the legislative judgments embedded in the statutory scheme of ERISA. *See, e.g., Guidry v. Sheet Metal Workers National Pension Fund*, —— U.S. ——, 107 L.Ed.2d 782, 110 S. Ct. 680 (1990) (declining to approve an exception for employee malfeasance or criminal misconduct to the unqualified ERISA prohibition on the assignment or alienation of benefits); *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985) (declining to expand ERISA statutory remedies for improper or untimely processing of benefit claims to include extra-contractual damages).

factors of the Restatement. Until the Fourth Circuit (either through its panel or, possibly, *en banc*) has applied its *Darden* test, it remains speculative whether that test will in practice conflict with the test prevailing in the Sixth and D.C. Circuits.

Thus, the standard for ERISA "employee" status is currently pending before the lower federal courts in a posture that may either clarify the law or effectively resolve a possible conflict among the courts of appeals. Until the issue is sharpened by further decision by the courts of appeals, any consideration by this Court would be premature.

CONCLUSION

The Petitioners' request for certiorari presents no issue that warrants this Court's consideration at this time. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April 20, 1990

APPENDIX

The following statement is provided pursuant to Rule 29.1 of the United States Supreme Court Rules, which requires that this brief include a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the Respondents.

Respondents are members of a group of corporations that includes commonly owned or managed stock and mutual insurance companies, mutual funds, and other companies. Ownership interests in these companies outside the corporate group are limited to the interests of mutual insurance policyholders and mutual fund stockholders. The following list sets forth the Respondents, parent companies of the Respondents, and mutual insurance companies and mutual funds affiliated with the Respondents:

Nationwide Mutual Insurance Company
Nationwide Mutual Fire Insurance Company
Nationwide Life Insurance Company
Nationwide General Insurance Company
Nationwide Property and Casualty Insurance Company
Employers Insurance of Wausau A Mutual Co.
Wausau County Mutual Insurance Company
NGC County Mutual Insurance Company
Farmland Mutual Insurance Company
NIF/Nationwide Money Market Fund
NIF/Nationwide Bond Fund
Nationwide Investing Foundation Fund
Nationwide Investing Foundation Growth Fund
Nationwide Corporation

No. 89-1499

IN THE

Supreme Court of the United States

October Term, 1989

A. F. PLAZZO
and
PLAZZO INSURANCE SERVICES, INC.,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE LIFE INSURANCE COMPANY,
NATIONWIDE GENERAL INSURANCE COMPANY,
and NATIONWIDE PROPERTY & CASUALTY COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

A. A Conflict Exists between the Fourth & Sixth Circuits.

Petitioners are gratified that the Respondents have acknowledged that the Fourth Circuit is **presently**[1] in conflict with the Sixth and D.C. Circuits. To resolve such a conflict was one of the reasons Petitioners invoked the jurisdiction of this court.

The question of whether the Darden standard is right or wrong should be reserved for **this court** upon the granting of this petition. After all, this case involves a controversy about an indefinite definition in a federal statute. The answer should be provided by the United States Supreme Court.

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[1]Under the doctrine of the law of the case, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation. 1B Moore's Federal Practice, ¶ 0.404[1] (1983 ed.). It seems, therefore, that Respondents' reliance upon the power of one panel of the Fourth Circuit to reverse another [such as the panel of Darden v. Nationwide Mutual Insurance Company, 796 F.2d 701 (4th Cir. 1986)] comes under the category of wishful thinking.

B. **A Conflict Also Exists, in Fact if not in Name, between the Sixth Circuit and the D.C. Circuit.**

Respondents have failed to acknowledge in their Brief, however, that the district court was reversed by a panel of the Sixth Circuit without any regard for the fact that the trial court had adopted and applied the common law analysis favored by the circuit for the District of Columbia. Appendix, 62-70. In Petitioners' view, the Sixth Circuit's categorizing of their status as "independent contractors" is, as a matter of law, **in conflict** not only with the result reached by the Holt court, but also with that circuit's rationale.[2] The term "employee," found in Section 3(6) of Title I of ERISA, ought not to be construed to exclude, as a

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[2]Compare Wolcott v. Nationwide Mutual Insurance Co., 884 F.2d 245 (6th Cir. 1989) with Holt v. Winpisinger, 811 F.2d 1532 (D.C. Cir. 1987). See also Plazzo v. Nationwide Mutual Insurance Co., No. 88-4016 slip op. (6th Cir., Dec. 22, 1989), rev'g, 697 F.Supp. 1437 (N.D. Ohio 1988) at Appendix, p. 81.

matter of law, an "independent contractor" unless there is an absence of control by the person for whom the services were performed. The terms are not mutually exclusive.

C. **A question of law or a question of fact.**

The Respondents offered Holt v. Winpisinger, 811 F.2d 1532, 1536 & nn.30, 31 (D.C. Cir. 1987) as the example of the principle of law used by the Sixth Circuit to justify reversals of the district courts in Plazzo and Wolcott:

> The ultimate characterization of an individual as an employee or as an independent contractor - the legal significance of the facts found by the trier of fact - is a question of law.

See Respondents' Brief, page 7.

Holt is a bad example. There was no "trier of fact" in Holt. Moreover, most courts would question Respondents' characterization of "the legal significance of the facts . . . is a question of law." The headnote in Bostic v. Connor (1988), 37

Ohio St.3d 144, a workers' compensation case decided by the Ohio Supreme Court, is instructive:

> Whether someone is an employee or an independent contractor is ordinarily an issue to be decided by the trier of fact. The key factual determination is who had the right to control the manner or means of doing the work.

Holt posed and answered the very same question, i.e. "who had the right to control the manner or means of doing the work?" Despite Respondents' claim to the contrary, a close examination of the decision in Holt reveals that it treated the question of Holt's employee status as one of fact rather than one of law.

If one compares the decision of the district court in Plazzo with the decision of the appellate court in Holt, he would find that the reasoning employed, as well as the result achieved, were identical.

Consider the following: Holt was a bookkeeper who had worked under the

supervision of the same manager for ten years. The first year, however, was under a contract which, for policy reasons, designated her as an independent contractor. Relying solely upon this written provision, the administrator of the retirement plan concluded that Holt had been an employee for only nine years. Accordingly, he held that her retirement benefits had not vested. The trial court adopted the administrator's decision. The appellate court reversed. In holding that the benefits had vested, the appellate court determined, as a fact, that which the plan administrator and the trial court chose to ignore - that Holt's supervisor had maintained control over her work during the **entire ten years** of her employment.

The district court in Plazzo employed the same rationale and reached the same result as was reached in Holt v. Winpisinger, Id. It also held that the designation of

independent contractor in the Agents Agreement was not dispositive of non-employee status. The district court weighed the evidence and found that Respondents exercised "pernicious control" over their agent, Plazzo, and that, under such conditions, he was entitled to the retirement benefits available to an employee under ERISA in the same way that such benefits were available to Holt. Plazzo, an insurance agent, had been trained and continuously supervised by the very same Nationwide District Sales Manager that had recruited him to sell insurance, exclusively for Nationwide, 22-1/2 years earlier. Plazzo was not an independent agent.[3] He was contractually limited to selling Respondents' insurance at

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[3]Of the 5,000 Nationwide career agents, none are members of the Independent Insurance Agents Association, an organization of independent insurance agents. They cannot be. Nationwide agents, sometimes called "captive agents," are rejected by that organization because of restrictions imposed by Nationwide in their Agents Agreement.

a commission rate set unilaterally by them.

Not only is the Sixth Circuit in conflict with the Fourth Circuit, but, having reversed the district court, it has produced a conflict with Holt v. Winpisinger, Id.

D. What Should the Standard Be to Determine Employee Status under ERISA?

Following a lengthy analysis of the question "whether A.F. Plazzo and his agency were 'employees' of Nationwide within the meaning of 29 U.S.C. §1002(6)" (Appendix, 47-62), the district court concluded that there was "no need or justification . . . to suggest that any meaning other than a common law definition [of 'employee'] was intended by Congress." Should this court conclude otherwise, the appropriate standard for determining "employee" status under ERISA ought to take into account the protective purposes of the statute.

In a quote attributed to him, Clarence Seward Darrow said, "[l]aws should be like

clothes. They should be made to fit the people they are meant to serve."[4]

This common sense view is supported by the rules of statutory construction, the legislative history, and the interpretations of the U.S. Department of Labor. Where the resolution of a question of federal law turns on the meaning of a statute and the intent of Congress, courts look first to the statutory language and then to legislative history if the statutory language is unclear. Blum v. Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984).

Respondents have argued, in their Brief in Opposition, that the ERISA vesting requirements, as well as the tax and labor regulations that relate thereto, adopt the common law test of employee status. See Respondents' Brief, pages 7, 9-12. The

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[4]Bradley, Daniels & Jones, The International Dictionary of Thoughts (J.G. Ferguson Pub. Co. 1969) 429.

argument is both incomplete and misleading as will be disclosed by the response that follows.

E. The Legislative History Reflects that Congress Intended the Term "Employee" Be Construed Liberally.

The purposes of ERISA are explicitly set forth in 29 U.S.C. §1001.[5] Congress observed that the "growth in size, scope and numbers of employee benefits plans" has had a continuing impact on the "well-being and security of millions of employees and their dependents." 29 U.S.C. §1001(a). With the growth of employee benefit plans, Congress became concerned that "many employees with

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[5]The Fourth Circuit's view of statutory construction referred to in Darden is supported by the United States Supreme Court in C.I.R. v. Engle, 464 U.S. 206, 104 S.Ct. 597, 78 L.Ed.2d 597 (1984), where it said that the court's duty in interpreting statutory language is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.

long years of employment [were] losing anticipated retirement benefits owing to the lack of vesting provisions in such plans." 29 U.S.C. §1001(a).[6]

Courts have held that the general objective of ERISA was to increase the number of individuals in employer financed benefit plans and to assure that those participants

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[6]The comments of the House Committee on Ways and Means are particularly illuminating on the grave public policy concerns which prompted the legislation regulating pension plans:

> One of the most important matters of public policy facing the nation today is how to assure that individuals who have spent their careers in useful and socially productive work will have adequate incomes to meet their needs when they retire. This legislation is concerned with improving the fairness and effectiveness of qualified retirement plans in their vital role of providing retirement income.

H.R. Rep. No. 93-807, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Admin. News at 4676.

actually received benefits.[7] ERISA was the result of a congressional endeavor to insure that plan participants do not lose vested benefits because of arbitrary forfeiture provisions.

The legislative history of ERISA expressly provides that Congress intended as a matter of national policy that the Act be applied as expansively as possible. The

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[7]The Senate Committee on Finance stated, in broad outline, that ERISA was designed:

> (1) to increase the number of individuals participating in retirement plans;
>
> (2) to make sure that those who do participate in such plans do not lose their benefits as a result of unduly restrictive forfeiture provisions or failure of the plan to accumulate and retain sufficient funds to meet its obligations; and
>
> (3) to make the tax laws relating to such plans fairer by providing greater equality of treatment under such plans for the different taxpaying groups involved.

S.Rep. No. 93-383, 93d Cong. 1st Sess. (1973), reprinted in 1974 U.S. Code Cong. & Admin. news at 4890.

legislative history states:

> Generally, it would appear that the wider or more comprehensive the coverage, vesting, and funding, the more desirable it is from the standpoint of national policy.
>
> . . .
>
> One of the major objectives of the new legislation is to extend coverage under retirement plans more widely.

H.R. Rep. No. 93-807, supra at 4682 and S. Rep. No. 93-383, supra at 4904.

By adopting solely the technical common law analysis of "employee" status, ERISA's intended reach would be narrowed significantly. The statute ought not to be applied in a common law vacuum but should take into consideration the remedial purposes which Congress intended -- a view supported by the U.S. Department of labor.

F. The Labor Department Has Interpreted the Definition of "Employee" under ERISA Liberally In Light of the Protective Purposes of the Act.

If a court, in interpreting a statute, finds that Congress expressed a specific intent with respect to the issue at hand, the

court's inquiry stops there and that intent is enforced regardless of a contrary agency opinion. However, if the court finds that Congress' intent was not specifically expressed, an agency's interpretation should be accorded great deference and should be invalidated only if it is not a "reasonable accommodation" of conflicting policies which were committed to the agency's care by statute. Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Board, 804 F.2d 1059 8th Cir. (1986) at p. 1063.[8] The U.S. Department of Labor ("Labor"), the federal agency vested with statutory authority to promulgate regulations to carry out the provisions of ERISA, has taken the position that the term "employee" must be interpreted in light of

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[8]"When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

the remedial purposes of the statute. Should this court find, during its search to determine Congress' intent, that the legislative history of ERISA is not conclusive, it could defer to Labor's interpretation.[9]

The Department of Labor[10] has opined that the term "employee," as used in the statute, should be interpreted liberally in

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[9]"If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation . . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron U.S.A. v. NRDC, 467 U.S. 837, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

[10]The authority of the Department of Labor to interpret the statute is explicitly granted in the statute itself. Under 29 U.S.C. §1135, the Secretary is authorized to "prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this subchapter [ERISA, Title I]." The "Secretary" is defined as the Secretary of Labor. 29 U.S.C. §1002(13).

light of the protective purposes of ERISA, and gone on to state:

> It is our interpretation that insurance agents whose business activity is predominantly with one life insurance company are 'employees' of that life insurance company within the definition set forth in §3(6) [29 U.S.C. §1002(6)] . . . . Where there exists a potential for abuse under an employee benefit plan, the Department intends to interpret the provisions of ERISA liberally in favor of plan participants and their beneficiaries, in order to protect their rights and benefits under the plan. For this reason, the definition of 'employee' as set forth in §3(6) [id.] of ERISA is interpreted broadly to include certain insurance agents who under common-law rules would not be deemed to be 'employees'. Congress has expressed its intent for broad interpretation of the coverage of ERISA to protect the interests of participants and their beneficiaries. Evidence of this intent is reflected by section 4(a) [29 U.S.C. §1003(a)] of ERISA which extends the jurisdiction of Title I provisions to participants of all employee benefit plans except those handfuls mentioned in section 4(b) [29 U.S.C. §1003(b)] (and those plans exempted from certain parts of Title I pursuant to sections 201, 301 and 401 of ERISA [29 U.S.C. §§1051, 1081, 1101]).

Furthermore, Department of Labor Opinion Letter 81-88A (July 9, 1981), citing Opinion

Letter 77-75A, notes that "the Department . . . intends to interpret the provision of ERISA liberally to protect the rights of plan participants and beneficiaries" and noted that insurance agents whose business activity is predominantly with one life insurance company are 'employees' of that life insurance company within the definition set forth in Section 3(6) of ERISA [29 U.S.C. §1002(6)].[11]

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[11]That the Department of Labor has not restricted the meaning of "employee" to a narrow definition derived from the common law is also evident from its regulations promulgated under ERISA. At 29 C.F.R. § 2510.3-3(c), the regulations specify which category of persons shall not be deemed employees for purposes of ERISA. They provide that "an individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse, and . . . a partner in a partnership and his or her spouse shall not be deemed to be employees with respect to the partnership." These specific exclusions under the definition of "employee" leave the definition quite broad -- much broader than the common law definition of "employee."

G. Congress Has Construed the Term "Employee" in Other Legislation Broadly.

Respondents cite Treasury Regulation §31.3121(d)-1(c)(1) for the proposition that common law rules should apply to the definition of "employee" under ERISA. However, the "definition" cited by Respondents is in fact just one part of a laundry list of classes of individuals regarded as "employees" by the Treasury Department for certain income tax purposes. While common law employees are one such class of individuals, other classes -- including full-time life insurance salesmen, are treated as employees under the regulations as well. Treas. Reg. §31.3121(d)-1(d).

Indeed, a careful examination of federal legislation in related areas reveals that, in general, Congress has consistently rejected limiting the definition of "employee" solely to its technical common law meaning. Similarly, the Internal Revenue

Code, 26 U.S.C. §1, et seq., for example, contains at least six definitions of "employee."[12] Most of these definitions are tailored to fit the definition contained in Chapter 21 of the Internal Revenue Code, 26 U.S.C. §§3121 et seq., the FICA provisions. There again the Code defines "employee" to include corporate officers, agent or commission drivers distributing produce, traveling salesmen, full-time life insurance salesmen, and others -- in addition to common law employees. 26 U.S.C. §3121(d). The class of persons deemed to be employees is much broader than that envisioned by the common law. Similarly, the Social Security

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[12]"Employee" is defined in 26 U.S.C. §1402(d), 3121(d), 3231(b), 3306(i), 3401(c), and 7701 (a)(20) of the Code. Three of these definitions explicitly rely on the FICA definition contained in 26 U.S.C. §3121(d). None of these definitions "adopts" the common law definition. Regulations promulgated under 26 U.S.C. §3401(c) (the withholding provisions), however, vary only slightly from the common law definition. See Treas. Reg. §31.3401(c)-1.

Act, 42 U.S.C. §301 et seq., repeats those individuals included as "employees" in the Internal Revenue Code. 42 U.S.C. §410(j). Such federal legislation expands the common law definition of "employee."

CONCLUSION

It is the business of the Supreme Court of the United States to resolve conflicts between the circuits; to construe federal law to carry out the intent of Congress; and, most importantly, to judicially clarify federal law, both substantively and procedurally, for the benefit of both the trial and the appellate courts. This case presents an opportunity for the Supreme Court of the United States to accomplish each of these objectives.

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FILED

SEP 6 1990

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

A.F. PLAZZO, ET AL., PETITIONERS

v.

NATIONWIDE MUTUAL INSURANCE COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether plans providing retirement benefits to respondent's insurance agents, who are characterized by respondent as "independent contractors" rather than as "employees," are subject to the requirements of the Employee Retirement Income Security Act of 1974.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

Petitioner Anthony Plazzo was an insurance agent who represented respondents, the Nationwide Companies, for more than 20 years. He contends that he was an "employee" of Nationwide for purposes of Section 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1002(6), and therefore is entitled to certain retirement benefits under plans sponsored by Nationwide. He is not entitled to those benefits if, as Nationwide contends, he was an "independent contractor" rather than an employee. Both the Department of Labor and the Internal Revenue Service have administrative responsibilities

under ERISA and have considered whether persons are "employees" for purposes of the Act.[1]

1. Plazzo operated an insurance business that he incorporated as Plazzo Insurance Services, Inc. From 1961 to 1983, Plazzo represented only the Nationwide Companies—which provide, inter alia, fire insurance, life insurance, and property and casualty insurance. Pet. App. 82-83. Nationwide sponsored two benefit plans for insurance agents such as Plazzo. Pursuant to its deferred compensation incentive plan, "Nationwide maintained a retirement account for Plazzo and * * * annually credited to that account a sum based on Plazzo's earnings from original and renewal fees for insurance policies." *Id.* at 26. Under the second plan, the extended earnings plan, Nationwide promised to pay Plazzo "a sum equal to his earnings from renewal fees over the prior twelve months" after he left the Company. *Ibid.*[2] Both plans provide for the forfeiture of benefits if an agent competes with Nationwide within a 25-mile radius of his former business location within one year after he stops representing the company. The plans also provide for forfeiture if a former agent ever induces a Nationwide policyholder to cancel a Nationwide contract. *Id.* at 26-27.

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[1] The Secretary of Labor has general administrative authority with respect to Title I of ERISA, 29 U.S.C. 1001-1168, which includes the definitional provisions at issue in this case and, among other things, the rules relating to reporting and disclosure and fiduciary responsibility. Title II of ERISA, which amended the rules governing the tax qualification of retirement plans (see 26 U.S.C. 401(a)), is administered by IRS. See Reorg. Plan No. 4 of 1978, § 101, 5 U.S.C. App. at 1374. The Act provides that with respect to the rules relating to the minimum standards for participation, vesting, and funding—matters over which both agencies have authority (see 26 U.S.C. 410(a), 411, 412; 29 U.S.C. 1052, 1053, 1082)—the Secretary of Labor shall follow IRS's approach. The agencies attempt to coordinate their administration.

[2] Nationwide reports that these plans are not qualified for tax purposes. However, Nationwide sponsors a separate retirement plan (not open to its insurance agents) that qualifies for favorable tax treatment. Nationwide's Opening Br. at 8, 11, *Darden* v. *Nationwide Mutual Insurance Co.*, No. 89-2759(L) (4th Cir.).

In 1983, Nationwide cancelled its agency agreement with petitioner, in part because Plazzo had sued the company for breach of contract. Nationwide subsequently decided that Plazzo had forfeited his benefits because Plazzo's son, allegedly with Plazzo's assistance, was selling insurance for other companies and had induced Nationwide policyholders to switch insurance companies. Pet. App. 83-84, 85. Had the benefits not been forfeited, Plazzo would have received approximately $150,000 under the deferred compensation incentive plan and approximately $120,000 under the extended earnings plan. C.A. App. 8-9, 27-28.

2. Section 3(2)(A) of ERISA defines a "pension plan" as either a plan that "provides retirement income to employees" or a plan that "results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. 1002(2)(A).[3] If the plans are pension plans covered by ERISA, then the forfeiture provision is invalid because, under the vesting rules set forth in Section 203(a) of ERISA, 29 U.S.C. 1053(a), vested benefits are nonforfeitable. Section 203(a) further provides that benefits must vest according to alternative schedules. Since pension benefits must be fully vested under any schedule after ten years of employment and Plazzo represented Nationwide for more than 20 years, his benefits vested and are nonforfeitable if Nationwide's plans are subject to ERISA.

Nationwide concedes that the forfeiture provision in its plans is invalid if the plans are subject to ERISA. Br. in Opp. 4-5. However, Nationwide contends that ERISA is not applicable because Plazzo was not an "employee." As noted, the Act defines a pension plan as one that "provides retirement income to *employees*" or that "results in a deferral of income by *employees*." § 3(2) (emphasis added). In Nationwide's view, its insurance agents are independent contractors rather than em-

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[3] The district court in this case held that Nationwide's plans provide "retirement income" or "result[ ] in a deferral of income" to retirement. Pet. App. 71-76.

ployees, and therefore its plans are not "pension plans" within the meaning of the Act.[4]

3. Section 3(6) of ERISA, 29 U.S.C. 1002(6), defines "employee" as "any individual employed by an employer." Pet. App. 49. The district court agreed with Nationwide that Congress, in enacting Section 3(6), intended courts to apply "the classic common law test which was developed to define the distinctions between an independent contractor and an employee in order to determine whether vicarious liability would obtain in an employment relationship." Pet. App. 48, 62. In so holding, the district court expressly rejected (*id.* at 57-58) the approach followed by the Fourth Circuit in *Darden* v. *Nationwide Mut. Ins. Co.*, 796 F.2d 701, 706 (1986), on remand, 717 F. Supp. 388 (E.D.N.C. 1989), which held that the common law test is not applicable in this context.[5] The district court similarly paid no "special deference" to the judgment of the Department of Labor (Pet. App. 52), which had concluded that "the definition of

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[4] In other cases, persons have sought to sue under Section 502(a) of ERISA, 29 U.S.C. 1132(a), as "participant[s]" in employee benefit plans. Noting that " '[p]articipant' within the statutory scheme of ERISA is a subset of the term 'employee,' " the courts have determined that whether the person is entitled to bring suit depends on whether the person is an "employee." *Mayeske* v. *International Ass'n of Fire Fighters*, 905 F.2d 1548, 1552 (D.C. Cir. 1990).

[5] The Fourth Circuit in *Darden* enunciated a three-factor test based on Section 2 of ERISA, 29 U.S.C. 1001. Section 2(a) states that Congress enacted ERISA because of its concern that "many employees with long years of employment are losing anticipated retirement benefits." 29 U.S.C. 1001(a). Under the Fourth Circuit's approach, ERISA protects persons who (1) reasonably anticipated that they would receive retirement benefits under a plan, (2) relied on that expectation, and (3) lacked bargaining power to obtain nonforfeitable rights contractually. 796 F.2d at 706-707. Although the district court derided that approach as "result oriented" (Pet. App. 57) and held that "no need or justification is shown here to suggest that any meaning other than a common law definition was intended by Congress" (*id.* at 62), the court inexplicably stated that it had weighed and assessed "both common law and *Darden*" factors in deciding whether Plazzo was an employee (*id.* at 69). However, while the court specifically considered each of the 12 common law factors in turn (*id.* at 62-69), it did not explicitly evaluate the facts of this case under the three factors set out in *Darden*.

'employee' as set forth in section 3(6) of ERISA is interpreted broadly to include certain insurance agents who under common-law rules would not be deemed to be 'employees.' " Dep't of Labor, Op. Ltr. No. 77-75 A, at 3 (Sept. 21, 1977).

Applying a 12-factor "common law" test, the district court concluded that Plazzo was an "employee" rather than an "independent contractor." [6] The court acknowledged that Plazzo, who was paid on a commission basis, was designated as an independent contractor in his agreement with Nationwide, that he hired his own employees and operated his own office, and that he set his own hours and relied primarily on his own initiative, skill, and judgment. However, the district court emphasized that Plazzo had represented only Nationwide for more than 20 years and that the company had exercised control over his activities by requiring attendance at sales meetings and setting sales quotas. The court also stressed that Nationwide exercised complete control over the terms of its agreements with its agents. Pet. App. 62-70. The district court concluded that Plazzo is "entitled to enforce payment of his pension benefits." *Id.* at 80.

4. The court of appeals reversed. It held that Plazzo was not entitled to benefits because ERISA's nonforfeiture provisions are not applicable to Nationwide's plans. Pet. App. 81-90. The court noted its recent holding in *Wolcott* v. *Nationwide Mut.*

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[6] The court of appeals summarized the common law test as calling for evaluation of the following factors: "1) the degree of control and supervision over the manner in which the work is performed; 2) whether or not the 'employee' is engaged in his own business; 3) the company's right to hire and discharge the persons doing the work; 4) the method of compensation to the 'employee'; 5) whether the 'employee' receives the same benefits as the company's regular employees; 6) who has control of the premises where the work is done; 7) how the parties structure their Social Security and income relations; 8) whether the 'employee' stands to make a profit on the work of those working for him; 9) the amount of the 'employee's' investment in facilities and equipment; 10) the belief of the parties as to their business relationship; 11) the amount of skill required in the particular occupation; and 12) the duration of time for which the 'employee' is employed." Pet. App. 87 (quoting *Wolcott* v. *Nationwide Mut. Ins. Co.*, 884 F.2d 245, 251 (6th Cir. 1989)); see Restatement (Second) of Agency § 220 (1933).

Ins. Co., 884 F.2d 245 (6th Cir. 1989), that "the common law rules of agency should be used in determining whether an individual is an employee for ERISA purposes." Pet. App. 86-87. In that case, which also involved "a commissioned agent with Nationwide for twenty years" (*id.* at 88), the court had concluded that the agent was an independent contractor, rather than an employee, under the 12-factor common law test. Since Plazzo, like the agent in *Wolcott*, "owned and maintained his own office building"; "exercised managerial skill in operating his business"; "hired, paid, and established a health insurance plan for his employees"; "maintained bank accounts to pay the monthly expenses of operating his business"; "was paid on a commission basis and reported to the IRS that he was self-employed"; and "maintained his own Keogh retirement plan," the court of appeals held that he "was an independent contractor, not an employee for the purposes of ERISA." *Id.* at 89-90.

ARGUMENT

We believe the result below is consistent with the language and purpose of ERISA. As indicated by this Court's precedents construing similar statutes, the term "employee" should be defined by applying a modified common law test—one guided by the traditional understanding of the term but at the same time sensitive to the remedial purpose of ERISA. Under that test, Plazzo is properly considered an independent contractor, not an employee.

But the courts of appeals are currently divided on this important definitional question. We therefore believe that, as with other federal statutes that have raised a similar question of interpretation, the issue warrants review and resolution by this Court.

1. In our view, the court of appeals reached the correct result in this case.

a. Section 3(6) of ERISA defines " 'employee' in circular terms" (*Mayeske* v. *International Ass'n of Fire Fighters*, 905 F.2d 1548, 1552 (D.C. Cir. 1990)) as "any individual employed

by an employer." Congress has either followed such an approach or provided no definition at all in many statutes. In a recent decision involving the question of employee status under the 1976 Copyright Act, the Court stated that "when Congress has used the term 'employee' without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common law agency doctrine." *Community for Creative Non-Violence (CCNV)* v. *Reid,* 109 S. Ct. 2166, 2172 (1989) (citing Federal Employer Liability Act cases).[7] Under the common law test, the ultimate question is whether "with respect to his physical conduct in the performance of the service," the person "is subject to the other's control or right to control." Restatement (Second) of Agency § 220(1) (1933). A focus on the right to control flows naturally from the purpose of the common law test, which is to determine whether a party should be held vicariously liable for another person's tortious acts.

In other circumstances, involving remedial social legislation, the Court has departed from a strict common law test in determining whether a person is an employee. Under the Fair Labor Standards Act of 1938 (FLSA), for example, the Court has concluded that "many persons" who " 'were not deemed to fall within an "employer-employee" category' " under the common law are nevertheless employees under the FLSA. *Rutherford Food Corp.* v. *McComb,* 331 U.S. 722, 729 (1947) (quoting *Walling* v. *Portland Terminal Co.,* 330 U.S. 148, 150-151 (1947)).[8] But while rejecting a strict common law test in FLSA cases, the Court has considered factors similar to those analyzed under the common law of agency. In *Rutherford Food,* for ex-

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[7] The conclusion that resort to the common law test was warranted was reinforced in *CCNV* by Congress's use of the term "scope of employment" in the Copyright Act provision at issue, since "scope of employment" is "a widely used term of art in agency law." 109 S. Ct. at 2172.

[8] The FLSA is particularly relevant here since the definition of "employee" under that Act – " '[e]mployee' includes any individual employed by an employer" (see 331 U.S. at 728 n.6 (quoting ch. 676, § 3(e), 52 Stat. 1060)) – is nearly identical to the definition of "employee" in Section 3(6) of ERISA.

ample, where the question was whether certain persons who worked as boners in a slaughterhouse were employees entitled to FLSA overtime pay, the Court noted that while "profits to the boners depended upon the efficiency of their work, it was more like piecework than an enterprise that actually depended for success upon the initiative, judgment or foresight of the typical independent contractor." 331 U.S. at 730. Viewing "the circumstances of the whole activity," the Court concluded that the boners were employees rather than independent contractors. *Ibid.*

The Court has summarized the relevant determination in such cases by stating that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." *Bartels* v. *Birmingham*, 332 U.S. 126, 130 (1947). But while "reject[ing] the test of the 'technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants' " (*United States* v. *Silk*, 331 U.S. 704, 713 (1947)), the Court has also repeatedly borrowed the factors developed under the common law of agency.[9] Analysis of the common law factors has been tempered so as "to accomplish the purposes of the legislation." *Id.* at 712.[10]

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[9] The courts of appeals have similarly rejected application of a strict common law test for determining employee status for purposes of social legislation, although in many instances they have relied upon a variety of common law factors in fashioning a test. See, *e.g.*, *Donovan* v. *DialAmerica Marketing, Inc.*, 757 F.2d 1376 (3d Cir.) (FLSA), cert. denied, 474 U.S. 919 (1985); *Clarkson Constr. Co.* v. *OSHRC*, 531 F.2d 451, 457-458 (10th Cir. 1976) (OSHA); *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261 (4th Cir. 1974) (same); *EEOC* v. *Zippo Mfg. Co.*, 713 F.2d 32, 37 (3d Cir. 1983) (ADEA); *Cobb* v. *Sun Papers, Inc.*, 673 F.2d 337, 341 (11th Cir.) (Title VII of 1964 Civil Rights Act), cert. denied, 459 U.S. 874 (1982); cf. *Korea Shipping Corp.* v. *New York Shipping Ass'n*, 880 F.2d 1531, 1535 (2d Cir. 1989) (Title IV of ERISA).

[10] In *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court appeared to abandon the common law test completely. It instead relied exclusively on its view of "the mischief to be corrected and the end to be attained" in determining employee status under the NLRA. *Id.* at 124. Congress rejected that approach, and amended the NLRA specifically to provide that "any individual having the status of an independent contractor" under the common law test is not an employee under the NLRA. See *NLRB* v. *United Ins. Co.*, 390 U.S. 254, 256 (1968).

The lesson of these cases is instructive here. When Congress, with little or no explanation, adopts the term "employee," it does so against a backdrop of long accepted, common law use of that term. At the same time, an automatic transference to remedial social legislation of a test designed to define and limit the master's liability for the torts of his servant could serve to frustrate the goals of that legislation.[11] Thus, the court has recognized the need for sensitive application of the standard, so that those who should fall within the law's protection are not excluded.[12]

b. In its advisory opinions issued with respect to employee status under ERISA, the Department of Labor has endeavored to apply a modified common law test of the sort utilized by this

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[11] ERISA falls squarely within the tradition of remedial social legislation which the courts have construed liberally to effectuate their purposes. As this Court has noted, "[o]ne of Congress' central purposes in enacting [ERISA] was to prevent the 'great personnel tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp.* v. PBGC, 446 U.S. 359, 374 (1980) (footnotes omitted). Congress enacted ERISA to ensure, among other things, that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required * * *—he actually will receive it." *Id.* at 375. See also *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 720 (1984); *Smith* v. *CMTA-IAM Pension Trust*, 746 F.2d 587, 589 (9th Cir. 1984); *Kross* v. *Western Elec. Co.*, 701 F.2d 1238, 1242 (7th Cir. 1983); *Eaves* v. *Penn*, 587 F.2d 453, 457 (10th Cir. 1978). "[T]he overwhelming evidence of the remedial purpose of ERISA must be given due weight in construing provisions whose language and specific legislative history are susceptible of varying interpretations." *Rettig* v. *PBGC*, 744 F.2d 133, 155 n.54 (D.C. Cir. 1984).

[12] In these related contexts, this Court has declined to elaborate the applicable test, or its interpretive methodology, in detail. Thus, in *Silk*, while rejecting strict application of the common law test and turning instead to "the declared policy and purposes of the Act" at issue (331 U.S. at 713 (citation omitted)), the Court nevertheless admitted that "[p]robably it is quite impossible to extract from the statute a rule of thumb to define the limits of the employer-employee relationship" (*id.* at 716). Rather, turning back to the common law test, the Court stated that the "Social Security Agency and the courts will find that degrees of control, opportunities for profit or loss, investment in facilities, permanency of relations and skill required in the claimed independent operation are important for decision," but that "[n]o one is controlling nor is the list complete." *Ibid.*

Court in cases involving similar statutes. Thus, in response to a request for advice as to whether certain milk vendors were employees under the Act, the Department noted that, on the basis of the material provided, it did not appear that "the relationship between the milk suppliers and the milk vendors has any of the characteristics generally found in the relationships of employers and employees." Dep't of Labor, Op. Ltr. No. 81-88 A, at 4 (July 9, 1981). The Department sent the requester a copy of a recent decision "applying a common law test in determining whether an individual was an employee or an independent contractor," since that decision discussed "some of the factors which may be relevant" to determining employee status under ERISA. *Ibid.* While resorting to the common law test, however, the Department has also stated that "the definition of 'employee' as set forth in section 3(6) of ERISA is interpreted broadly," and may include persons "who under common-law rules would not be deemed to be 'employees.' " Dep't of Labor, Op. Ltr. No. 77-75 A, at 3 (Sept. 21, 1977).

In its administration of Title II of ERISA, IRS has also applied a common law test.[13] In *Professional & Executive Leasing, Inc.* v. *Commissioner,* 89 T.C. 225 (1987), aff'd, 862 F.2d 751 (9th Cir. 1988), a company devised a scheme to circumvent the minimum participation rules of 26 U.S.C. 401 and 410 in order to allow professionals to make themselves, but not their staffs, eligible for pension benefits.[14] Under the scheme, the professionals incorporated their practices and entered into service contracts with an agency that set up pension plans for the contract-

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[13] For discussion of the authority of the Department of Labor and IRS, see note 1, *supra.* The present case turns on the meaning of Section 3(6) (a matter in Labor's jurisdiction), but its resolution will affect the determination of whether pension rights have vested (a matter primarily in the IRS's jurisdiction). Thus, this case is an excellent illustration of the desirability of coordination.

[14] The minimum participation rules prohibit employers from qualifying a pension plan for the tax benefits available under Title II of ERISA if the plan does not provide benefits to a broad group of employees. The statute provides alternative methods for qualifying under the minimum participation standards; for example, a plan may be qualified if 70% of all employees benefit from the plan. 26 U.S.C. 410(b)(1)(A).

ing professionals and then "leased" the professionals back to their professional corporations. IRS determined that the professionals were not employees of the leasing agency, so that the plan did not qualify for favorable tax treatment. The Tax Court upheld that ruling, as well as the IRS's argument that "[t]o determine the existence of an employer-employee relationship we must look to common law concepts." 89 T.C. at 231.[15] As the Tax Court recognized (*id.* at 231 & n.10), IRS generally has relied on the common law test set out in its FICA regulations, 26 C.F.R. 31.3121(d)-1(c), to determine employee status.[16]

In short, the position of both agencies interpreting ERISA has been that whether a person is an employee should be determined primarily by analysis of the common law factors. But, in light of this Court's decisions construing remedial social legislation, the common law test must be sensitively applied in order not to frustrate Congress's goals in enacting ERISA. The inquiry normally depends on the factors in the common law test.[17] Yet as indicated by this Court's decisions under analogous statutes, the focus is not strictly on "control" but on all of the factors considered as a whole. And in close cases it is appropriate to consider which answer would further Congress's goals in

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[15] See also *Burnetta* v. *Commissioner*, 68 T.C. 387, 397 (1977) ("[i]n determining whether or not an individual is an 'employee' for purposes of section 401, we must look to the common law concepts used in making such a determination"); Rev. Rul. 75-35, 1975-1 C.B. 131 (where doctor formed a professional corporation with himself as the sole employee and a service corporation that employed his staff, the staff members were employees of the professional corporation for the purposes of ERISA's minimum participation requirements). Congress has recently enacted a special provision, 26 U.S.C. 414(n), governing employee leasing.

[16] IRS elaborated on that regulation, and on the common law test, in Rev. Rul. 87-41, 1987-1 C.B. 296. The Ruling sets out 20 factors to be used in determining whether a person is an employee.

[17] In its 1977 opinion letter, the Department of Labor suggested that one factor—whether a person is an employee for FICA purposes—was controlling. Dep't of Labor, Op. Ltr. No. 77-75 A, at 3-4. On reflection in light of this Court's decision in *CCNV*, which concluded that "[n]o one of these factors is determinative" (109 S. Ct. at 2179), the Department believes that all of the factors must be considered.

enacting ERISA.[18]

c. In this case, we believe that the court of appeals reached the correct result. As the district court recognized, agents like Plazzo set their own hours, are paid on commission, and rely primarily on their own initiative, skill, and judgment. Pet. App. 65-68. Indeed, they run their own businesses. As the court of appeals stressed, Plazzo incorporated his business, hired his own employees (and sponsored a health insurance plan for them), and even owned an office building. Plazzo reported to the IRS that he was self-employed and maintained a Keogh plan. *Id.* at 89-90.[19] In view of all these factors, it is clear that, as a matter of "economic reality" (*Bartels,* 332 U.S. at 130), Plazzo was an independent contractor.

To be sure, Plazzo was dependent on Nationwide to a significant extent since he represented that company exclusively for many years. His business no doubt would have experienced disruption had he allied it with another insurance company or had he decided to become an independent agent. But, in our view, the result in this case remains clear.[20] If agents like Plazzo are

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[18] Thus, for example, in a case such as the one involving the leasing of professional employees, IRS would properly look skeptically at any arrangement tailored to appear to be an employer-employee relationship under the common law test where the purpose of the arrangement is plainly to evade ERISA's minimum participation rules. Similarly, the agencies would properly question attempts to evade those requirements or to avoid paying pension benefits by giving employees the appearance of independent contractors. See, *e.g., Holt* v. *Winpisinger,* 811 F.2d 1532, 1534 (D.C. Cir. 1987) (clerical worker paid like, and listed as, independent contractor).

[19] Under 26 U.S.C. 401(c)(1)(A), "a self-employed individual" can establish a qualified retirement plan, commonly called a Keogh plan. If insurance agents such as Plazzo are "employees," then they are not "self-employed." Thus, a determination that Plazzo is an employee may disqualify his Keogh plan and subject him to back taxes based on the tax benefits obtained on account of the Keogh plan.

[20] In FICA, Congress provided that "employee" means "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee" (26 U.S.C. 3121(d) (2)), and added that the term embraces certain others, including "a full-time life insurance salesman" (26 U.S.C. 3121(d)(3)(B)). Thus, Congress

employees, then any retailer who works continuously and exclusively with another company—including, for example, the owners of many automobile dealerships—are employees rather than independent contractors. Such a result stretches the common law test far beyond its limits.[21]

Moreover, analysis of the relevant ERISA policies does not contradict the conclusion that Plazzo is not an employee. The most relevant ERISA policy in this case is that against "bad boy" clauses—clauses, like Nationwide's forfeiture provision, that disqualify persons for engaging in specified conduct that the employer seeks to prevent. ERISA prohibits such clauses in plans within its coverage to the extent that they would result in the forfeiture of vested benefits. See Rev. Rul. 85-31, 1985-1 C.B. 153; *Hummell* v. *S.E. Rycoff & Co.*, 634 F.2d 446, 449-450 (9th Cir. 1980). As the House Report noted, under Section 203(a), 29 U.S.C. 1053(a), "a vested benefit is not to be forfeited because the *employee* later went to work for a competitor, or in some other way was considered 'disloyal' to the employer." H.R. Rep. No. 807, 93d Cong., 2d Sess. 60 (1974) (emphasis added). See also H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 271 (1974) ("an *employee's* rights, once vested, are not to be forfeitable for any reason") (emphasis added); 120 Cong. Rec. 29,197 (1974)

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recognized that insurance agents are usually not employees under the common law rules. Moreover, Congress made clear that it did not intend its extension of the definition of employee in FICA to cover persons like Plazzo even if they sold only life insurance, since it further provided that life insurance salesmen are not employees for purposes of FICA if they have "a substantial investment in facilities used in connection with the performance" of their services. 26 U.S.C. 3121(d)(3).

[21] The district court in this case—which purported to apply a strict version of the common law test (see Pet. App. 62)—nevertheless concluded that Plazzo is an employee. Yet there is no doubt that if a person fell and was injured in Plazzo's office building on account of the negligent maintenance of the building, his remedy would lie against Plazzo and his corporation, not Nationwide. Many cases, of course, are closer, and the common law test does not always yield a clear answer. See *NLRB* v. *Hearst Publications*, 322 U.S. at 120 (there is no "simple, uniform and easily applicable test which the courts have used * * * to determine whether persons doing work for others fall in one class or the other").

ing "the policy against what has been described as 'bad boy' clauses") (statement of Rep. Dent). However, as the reports state, the policy against such clauses extends only to *employees* whose benefits have vested. Nothing in the Act or its legislative history suggests that Congress intended to prohibit forfeiture clauses in plans that provide benefits to persons who are truly independent contractors running their own businesses, rather than employees. In such instances, where the plan in question can fairly be regarded as part of a transaction between business entities, there is no justification for including the independent contractors within the class protected by ERISA's nonforfeiture rule.

2. In light of the disagreement in the courts of appeals, review by this Court is warranted.

The Fourth Circuit has taken a position different from that of the Department of Labor, the IRS, and each of the other courts of appeals that has considered the question presented. In *Darden*, that court abandoned the common law test completely. 796 F.2d at 706 ("[w]e conclude * * * that the common-law test for the relationship of master and servant is not the appropriate standard for application here"). Instead, the Fourth Circuit developed a three-factor test based exclusively on the purposes of ERISA as set forth in Section 2 of the Act, 29 U.S.C. 1001. That test—which considers whether the person reasonably anticipated benefits, relied on that expectation, and lacked bargaining power to obtain a nonforfeiture clause (796 F.2d at 706-707 (see note 5, *supra*))—is weighted heavily toward finding that any person who may participate in a benefit plan is an employee covered by ERISA.[22]

Other courts of appeals have expressly stated their disagreement with the Fourth Circuit's approach. In *Wolcott*, the Sixth Circuit noted that "[t]he *Darden* court rejected the common law

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[22] Congress might have extended the coverage of ERISA to all persons eligible to participate in plans providing benefits of the sort listed in Section 3(1) and (2) of the Act, 29 U.S.C. 1002(1) and (2). It instead limited coverage to plans providing retirement benfits to "employees" and plans providing welfare benefits to "participant[s]," which is in turn defined (29 U.S.C. 1002(7)) to mean certain "employee[s]" or "former employee[s]."

standard for defining 'employee,' and instead construed the term 'in light of the mischief [sought] to be corrected and the end [sought] to be attained' by ERISA." 884 F.2d at 250. The Sixth Circuit concluded (*ibid.*) that "the better reasoned position on [the] meaning of the term 'employee' is set forth in *Holt* [v. *Winpisinger*, 811 F.2d 1532, 1538 n.44 (D.C. Cir. 1987)]." In that case, the District of Columbia Circuit held that "one must look to the common-law rules of agency to determine employee status" under ERISA. 811 F.2d at 1538. Similarly, the Fifth Circuit recently expressed its disagreement with the Fourth Circuit's approach, holding that "because Congress provided no specific statutory definition of 'employee' under ERISA we properly apply the common law of agency." *Penn* v. *Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1102 n.6 (1990).[23]

The difference in approach will likely lead to a difference in result in many cases. Indeed, the district court on remand in *Darden* concluded that a Nationwide insurance agent who is essentially indistinguishable from Plazzo is an employee under Section 3(6) of ERISA. *Darden* v. *Nationwide Mut. Ins. Co.*, 717 F. Supp. 388, 391-393 (E.D.N.C. 1989). Nationwide suggests (Br. in Opp. 12-13) that the court of appeals might reverse that result.[24] Of course, Nationwide does not contend that the Fourth Circuit panel may reconsider the holding of the prior panel and adopt the common law test that the prior panel rejected. Rather, in its brief in the Fourth Circuit, Nationwide stresses its argument that Darden did not satisfy the reliance prong of the Fourth Circuit's test, pointing to evidence showing that Darden had established an individual retirement account and had otherwise invested his earnings wisely. Nationwide's

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[23] The Seventh and Eighth Circuits have applied the common law test in cases arising under ERISA, but appear to have done so in order to determine what class the term "employee" as used in a particular plan was meant to cover, rather than to determine what Congress meant in Section 3(6). See *Short* v. *Central States, S.E. & S.W. Areas Pension Fund*, 729 F.2d 567 (8th Cir. 1984); *Richardson* v. *Central States, S.E. & S.W. Areas Pension Fund*, 645 F.2d 660 (8th Cir. 1981); *Wardle* v. *Central States, S.E. & S.W. Areas Pension Fund*, 627 F.2d 820 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

[24] The case was argued on April 3, 1990, and is pending.

Opening Br. at 28-38, *Darden* v. *Nationwide Mutual Insurance Co.*, No. 89-2759(L) (4th Cir.). Thus, whether or not the Fourth Circuit panel reverses the district court, that circuit's test will differ markedly from that of the other circuits.[25]

While other courts of appeals have adopted positions closer to that of the Department of Labor, we are concerned that those courts may apply an unduly restrictive approach. In formulating their approach, those courts have properly emphasized this Court's invocation of "the conventional master-servant relationship as understood by common law agency doctrine" in *CCNV*, 109 S. Ct. at 2172. See *Mayeske*, 905 F.2d 1554-1555; *Penn*, 898 F.2d at 1102-1103.[26] But they have ignored this Court's decisions involving remedial social legislation—cases like *Rutherford Food*, *Silk*, and *Bartels*—which looked to traditional common law factors, but with an awareness of the very different context in which they were being applied.[27]

* * * * *

Although review by this Court is warranted, it should be limited to the first two questions presented in the petition.[28] There is no reason for review of the third question presented in the petition since there is no dispute that courts of appeals may freely review district court determinations as to whether a person is an employee. See *Penn* v. *Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1101 (5th Cir. 1990); *Holt*, 811 F.2d at 1536.

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[25] To the extent that the result under the Fourth Circuit's test depends on individual reliance by the particular person who claims to be an employee, the test would have unfortunate consequences. Under that approach, Nationwide and similar companies would not be able to determine at the outset whether they are operating "pension plans" subject to ERISA, since the result would ultimately depend on whether any person actually relied on the expectation of benefits under the plan in preparing for retirement.

[26] To our knowledge, however, no court has strictly applied the common law test as set forth in Section 220 of the Second Restatement of the Law of Agency (1933).

[27] Moreover, in *Penn*, where the court concluded that an employee lost that status (and hence entitlement to pension benefits) in part because the company changed his designation to independent contractor, we doubt that the court reached the correct result.

[28] Alternatively, the Court may wish to state the question in the form proposed in this brief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1990

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—262 203/20095

(6)

No. 89-1499

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

A.F. PLAZZO

and

PLAZZO INSURANCE SERVICES, INC.,
Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,
NATIONWIDE LIFE INSURANCE COMPANY,
NATIONWIDE GENERAL INSURANCE COMPANY, and
NATIONWIDE PROPERTY AND CASUALTY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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September 14, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Respondents Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company, Nationwide Life Insurance Company, Nationwide General Insurance Company and Nationwide Property and Casualty Company (collectively, "Nationwide")[1] hereby submit

[1] Pursuant to Rule 29.1 of the Court's Rules, a list setting forth the parent companies, subsidiaries (except wholly owned subsid-

their Supplemental Brief in Opposition to the Petition For Writ of Certiorari filed by A.F. Plazzo and Plazzo Insurance Services, Inc. (collectively, "Petitioners") in the above-named case. Pursuant to Rule 15.7 of the Court's Rules, this brief notes and is restricted to two new cases decided subsequent to the time of Nationwide's last filing.

As discussed in Nationwide's prior brief, this case concerns the applicability of Title I of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), to an incentive compensation arrangement provided by Nationwide to certain of its insurance agents, including Petitioners. That arrangement includes a conventional provision that imposes a financial penalty (loss of future payments) in the event the agent engages in contractually specified competitive activities. Nationwide believes that ERISA is inapplicable to this arrangement because, *inter alia*, Petitioners were not "employees" of Nationwide within the meaning of ERISA, which is a predicate to application of that statute.

ARGUMENT

In *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096 (5th Cir. 1990), the Fifth Circuit Court of Appeals addressed both of the issues cited by the Petitioners as grounds for this Court's review of the decision in *Plazzo*: (1) the definition to be applied in determining ERISA "employee" status, and (2) the standard for appellate review of such a determination. The Fifth Circuit in *Penn* reached the same conclusions on these issues as the Sixth Circuit in *Plazzo*. The Fifth Circuit ruled that the status of an individual as an "employee" under ERISA is a question of law subject to *de novo* review by the appellate court. *See* 898 F.2d at 1101. The Fifth Circuit then

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iaries) and affiliates of the Respondents was included as an Appendix to Respondents' Brief in Opposition to Petition for a Writ of Certiorari. No amendments are required to make such listing currently accurate.

held that "because Congress provided no specific statutory definition of 'employee' under ERISA we properly apply the common law of agency," following the reasoning of *Wolcott v. Nationwide Mutual Insurance Co.*, 884 F.2d 245 (6th Cir. 1989) and *Holt v. Winpisinger*, 811 F.2d 1532 (D.C. Cir. 1987). *See* 898 F.2d at 1101-1102 & n.6. The Fifth Circuit applied the common-law factors enumerated by this Court in *Community for Creative Non-Violence v. Reid*, —— U.S. ——, 104 L.Ed.2d 811, 109 S. Ct. 2166 (1989). *See* 898 F.2d at 1102-1103. The Fifth Circuit specifically noted and rejected the "employee" standard announced in *Darden v. Nationwide Mutual Insurance Co.*, 796 F.2d 701 (4th Cir. 1986), *on remand*, 717 F.Supp. 388 (N.D.N.C. 1989), *cross appeals pending*, Nos. 89-2759(L), 89-2760 (4th Cir.). *See* 898 F.2d at 1102 n.6.

In *Mayeske v. International Association of Fire Fighters*, 905 F.2d 1548 (D.C. Cir. 1990), the D.C. Circuit confirmed its prior decision, that common-law factors are determinative of ERISA "employee" status, in light of this Court's decision in *Community for Creative Non-Violence v. Reid, supra. See* 905 F.2d at 1553-1554.

These decisions further demonstrate that the decision of the Sixth Circuit in *Plazzo* was correct in all respects.

CONCLUSION

The Petitioners' request for certiorari presents no issue that warrants this Court's consideration prior to the resolution of the *Darden* appeal currently pending in the Fourth Circuit. Should the Petition be granted, however, Nationwide concurs in the view of the United States (as stated in its *amicus curiae* brief of September 1990) that review should be limited to the question of the standard for determining ERISA "employee" status. In such event, Nationwide further suggests that this matter is suitable for affirmance on the merits without additional briefing or oral argument.

Respectfully submitted,

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